Water Quality Enforcement Review

Report of the Enforcement Subcommittee
Water Quality Partnership

July 1999
Publication No. 99-18

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July 1999
Publication No. 99-18

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Forward

This report is prepared by the Subcommittee on Enforcement of the Water Quality Partnership. The partnership is a standing policy advisory committee on the state's water quality management functions. This report is a review of the Department of Ecology's (Ecology) water quality enforcement program, principally focusing on point source discharge enforcement.

This review concerns itself with formal enforcement actions. There are many informal actions (such as notice of correction, technical assistance, warning letters, and phone calls) which Ecology uses in its broader compliance functions. This report focuses on penalties, administrative orders, and notices of violations.

This report contains recommendations of the subcommittee to the whole partnership. These recommendations as well as partnership input are presented to Ecology's management team for consideration and implementation.

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Executive Summary

Enforcement Subcommittee of Water Quality Partnership

The Enforcement Subcommittee of the Water Quality Partnership conducted a review of Ecology's water quality enforcement program between November 1998 and July 1999. The subcommittee received assistance from the Department of Ecology in conducting this review. Recommendations are forwarded to the whole partnership and to Ecology.

Enforcement Trends Overall

The overall number of annual enforcement actions shows a slight increase over the past 10 years. During the same time, the level of enforcement staff has remained essentially the same while the number of permittees has grown from about 1,100 to over 4,400 currently. This means that the ratio of enforcement staff to permittees has grown from about 1:150 ten years ago to the present 1:600. Additionally, there is no current dedication of staff resources from a central office coordination function. This results in field enforcement staff shouldering a larger amount of administrative work.

Ecology regulates discharges from over 4200 permitted facilities. 3875 of these are industrial facilities (92% of total) and about 340 are municipal facilities (8% of total). From January 1994 through December 1998, 969 formal enforcement actions (penalties, orders, and notices of violations) were taken. 82% were levied against industrial violators and 18% against municipal violators. Of penalties issued, the median penalty amount is $3,000 to both municipal and industrial violators.

Number of Permits (as of December 1998)

	Municipal		Industrial		TOTAL
Individual	322	38%	521	62%	843
General	18	1%	3354	99%	3372
TOTAL	340	8%	3875	92%	4215

Number of Enforcement Actions (1/94 – 9/98)

Enforcement Actions						
	Municipal		Industrial		TOTAL	
Penalties (38%)	22	6%	339	94%	361	Median Penalty Amount (all) = $3,000. Median Penalty Amount (Muni) = $3,000. Median Penalty Amount (Ind) = $3,000.
Orders (36%)	96	27%	255	73%	351	
NOVs (26%)	57	22%	200	78%	257	
TOTAL	175	18%	794	82%	969	

The median number of days to issue a penalty is about 78 days to all violators as a group. It takes slightly longer (83 days, median) to issue a penalty to a municipality compared with 78 days (median) to issue a penalty to an industrial violator. It takes about 83 median number of days total to issue an administrative order to all violators as a group. The median number of days to issue orders to municipalities is 109 days, whereas it takes 82 median number of days to issue an order to an industrial violator.

The rate of compliance with effluent limitations[1] for all dischargers is about 96.8% total. The compliance rate for municipal facilities as a group is about 96.4% while the compliance rate for industrial facilities as a group is about 97.5%.

About half[2] of the industrial facilities (approximately 1800) submit discharge monitoring reports to Ecology, while essentially all municipal facilities are required to submit discharge monitoring reports. These reports show effluent limits in compliance and parameters in violation. Of the facilities reporting effluent limit violations, 75% are industrial facilities. These facilities account for 50% of total number of effluent limit violations, with municipal violators accounting for the remainder.

Summary of Subcommittee Recommendations

Treatment of Municipal and Industrial Violators

- All dischargers should be held to compliance with permit requirements.
- Enforcement actions other than penalties can be effective and should be used.
- Ecology should use limited discretion with enforcement. Violations should be addressed and significant noncompliance needs a formal enforcement response.

Timeliness of Enforcement Actions

- The subcommittee finds that when Ecology takes enforcement, it is generally timely. The subcommittee recommends Ecology's enforcement guidelines be revised to reflect current practice.

- The subcommittee recommends Ecology better define the data definition "date violation detected" and ensure standard use.

Penalty Matrix Review

- Use of the penalty matrix should be made standard operating procedure.
- Revise the penalty matrix to:
  - Derive penalties (small and large) with a minimum of adjustment;
  - Incorporate or eliminate the need for the footnotes to the existing matrix;

[1] This is the percent of the number of violations compared with the number of "opportunities" – i.e., the total number of reported parameters times months of reporting. It does not include compliance with other permit requirements, such as construction schedules or special report requirements.

[2] Approximately 2,100 industrial and construction sites stormwater permittees do not have discharge monitoring report requirements.

- Better align scores of the matrix to dollar amounts so that the current inherent bias
- for small penalties is removed.
- Determine if changes or additional guidance are needed to integrate a "tripling" multiplier. Consider mass of violation and sensitivity of water body, and additional qualitative factors.

- Whenever economic benefit is considered, it should be considered consistently. Ecology should investigate the use of and obtain training of the U. S. Environmental Protection Agency's (EPA) economic benefit (BEN) model for calculating economic benefit, consistent with state law.

Mandatory Penalties

- Ecology should establish enforcement policy, which would require a "notice of penalty" be issued for certain, defined critical violations. It should be unlikely that deviation from this guideline could occur. Additionally, Ecology should establish policy for a lower tier of violations where issuance of a notice of penalty would typically occur.

- The subcommittee recommends that Ecology review other formal enforcement guidelines for the issuance of administrative orders and notices of violation to determine if changes are appropriate for the criteria to trigger those responses.

Municipal Sewer Connection Bans

- Ecology should adopt its draft moratorium policy so that a moratorium on sewer connections be imposed when (a) no local moratorium is in place; (b) facility has reached 100% capacity; and (c) facility is experiencing repeated effluent limit violations.

Designating Priority Violators

- Ecology should establish a state-specific definition using objective criteria to define serious and/or chronic violators that will receive priority attention from the department. The department should designate these as "**priority violators**."

- Ecology should track and publish a graph of priority violators for the purpose of tracking compliance over time, recognizing some violators may be so designated while discharging only a very small mass of material. This factor should be considered by Ecology in determining the appropriate enforcement response.

Public Reporting of the Compliance Program

- Ecology should publish an annual report on the compliance report, focusing on facility compliance and basic statistics of the enforcement program.

- EPA and Ecology should streamline and integrate EPA compliance reporting requirements within the subcommittee's recommended annual compliance.

Funding Recommendations

- Estimated costs of implementing Subcommittee recommendations:
  - Municipal Sewer Hookup Moratorium: Negligible.
  - Public Reporting: 0.25.
  - Mandatory Penalties: 0.5 FTE.
  - Designating Priority Violators: 0.1 FTE.
  - Penalty Matrix Revisions: 0.15 FTE.
  - Timeliness of Response: No additional cost.
  - Municipal and Industrial Treatment: No additional cost.
  - Total estimated cost: 1.0 FTE

- Ecology should implement the subcommittee recommendations at the level estimated.

- Ecology should establish and fill a central office water quality enforcement coordination function.

- The subcommittee acknowledges a current unfunded need in the enforcement program.

Enforcement Subcommittee Report

Introduction

The Enforcement Subcommittee is a subcommittee of the Water Quality Partnership. The partnership is a group of stakeholders representing large and small businesses, agriculture, municipal governments, tribes, environmental organizations, and state and federal agencies. It is a standing policy advisory committee to Ecology on various issues affecting the state's water quality program. The water quality program administers the wastewater discharge permit program, which regulates pollutants discharged into surface and groundwater. The program also provides assistance for controlling nonpoint source pollution, administers water quality grants and loans, maintains state water quality standards and assessments, and implements other aspects of federal and state clean water laws. The partnership has been providing advice to the department on the state's water quality program since 1994.

When the partnership believes a topic requires a greater degree of focus, it may establish a subcommittee to work with the department on that issue. Requests to form subcommittees can come from members of the partnership or from Ecology.

In September 1998, Ecology met with a series of environmental organizations, including members of the partnership, which had expressed concerned that Ecology's enforcement program was not adequately addressing serious or chronic water quality violations. Groups represented were Washington Environmental Council, Puget Sound Keeper Alliance, People for Puget Sound, Washington Public Interest Research Group (WashPIRG), and Northwest Environmental Advocates. Concerns expressed at the September meeting were concerns that:

- Significant/repeat violations were not penalized, even if other compliance tools have been used.
- Current enforcement philosophy isn't working for significant/repeat violations.
- Penalties should be mandatory for significant/repeat violations.
- There has been a marked shift away from enforcement to more assistance.
- Ecology is not embracing enforcement even though it is a key element of the Governor's salmon recovery initiative.
- Ecology has not seriously considered the approach New Jersey is implementing regarding enforcement and mandatory penalties.
- Ecology lacks sufficient staff resources for an adequate enforcement program and concern that Ecology should request more resources.
- Existing reporting of compliance is inadequate.
- Ecology remain diligent on point sources.

At that meeting, Ecology and participants agreed to the following:

- Propose to convene an enforcement subcommittee of the Water Quality Partnership at a subsequent meeting of the partnership.
- Ecology would provide staff support to the subcommittee.
- The subcommittee, with assistance from the Ecology's internal Enforcement Workgroup, would address and make recommendations to the whole partnership and Ecology on the following topics:
  - Are mandatory penalties for significant/repeat violators the right compliance tool?
  - Are point source water quality compliance resources adequate?
  - Assess various compliance tools – when and where they are used and how effective are they?
  - Is different treatment of municipal and industrial facilities appropriate?
  - How should compliance status be tracked and communicated?
  - Is there a need for a policy on significant/repeat violators?

Accordingly, Ecology and environmental groups members of the partnership proposed the establishment of the Enforcement Subcommittee to conduct a program review of Ecology's water quality enforcement program at the partnership's November 4, 1998, meeting**.** Members of the Enforcement Subcommittee are:

Active Members[3]

- BJ Cummings, Puget Sound Keeper Alliance
- John Dohrmann, Puget Sound Water Quality Action Team
- Cathy Feole, Northwest Pulp and Paper Association
- Pete Hildebrandt, Consultant, Oil and Aluminum Industries
- Bob Hirsch, King County Water Pollution Control Department
- Bud Leber, Kaiser Aluminum
- Dave Ragsdale, U. S. EPA Region 10
- Lynn Schroder, Northwest Marine Trades Association
- Jon Steir, WashPIRG

Contributing Members

- Lincoln Loehr, Heller, Ehrman Associates
- Alex Teimouri, U. S. Department of Energy
- Bruce Wishart, People for Puget Sound
- Bruce Chattin, Washington Aggregate and Concrete Association

[3] Active members are those that attended at least half of the Subcommittee meetings. The Subcommittee met nine times between November 1998 and June 1999. Meeting dates were: November 23, December 15, January 14, February 18, March 15, April 15, May 13, May 26, and June 9.

Support and Technical Assistance to the Subcommittee:

- Kathy Emmett, Ecology Southwest Regional Office
- Ralph Svrjcek, Ecology Northwest Regional Office
- Marc Crooks, Solid Waste and Financial Assistance Program
- Dan Wrye, Ecology Water Quality Program

Also at its November 4 meeting, the partnership established ground rules pertaining to the use of subcommittees. Those recommendations pertain to the Enforcement Subcommittee and are as follows:

- Subcommittees are to function as technical work groups for the partnership.
- Subcommittees are to prepare options and recommendations, if possible, for partnership discussions.
- Subcommittees are to document their work.
- Documentation is to be the product of subcommittee.
- The size of subcommittees is to be of such to ensure it produces a deliverable to the partnership and generally less than 13 members.
- Whole partnership must have opportunity to discuss subcommittee's product and non-subcommittee group's input, if any.
- Duration of subcommittee is as long as needed and agreed to by members, but must have a scheduled end.
- Partnership as a whole remains an inclusive body.

Purpose and Process

At its February 1999, the subcommittee established its purpose is to:

> *Provide a forum to discuss Ecology's point source enforcement program; identify and check perceptions; and, if possible, provide recommendations for its improvements to the Water Quality Partnership and the department.*

The subcommittee operated on a "strive towards consensus" basis. Ecology presented issue papers on various topics. Each paper had discussion questions that prompted member opinions, values and interests. The results of subcommittee discussions were recorded on the issue paper and discussed for concurrence at a following meeting. The issue papers were revised to reflect the greatest amount of group agreement. Where individual or groups of members offered differing views, the issue papers acknowledge those differences. The issue papers are incorporated into this report as individual section topics.

The subcommittee initially met half days monthly from November 1998 through March 1999. As deliberations increased, beginning in April, the group moved to full day meetings through June 1999.

Topics Considered

The subcommittee addressed the following topics:

- **Treatment of Municipal and Industrial Violators.** *Is there a difference in treatment between municipal and industrial violators? If so, should there be such a difference? Should existing program guidance be revised? How?*

- **Timeliness of Enforcement Actions.** *Is Ecology responding in a timely manner to violations? Should existing program guidance be revised to reflect current response times?*

- **Penalty Matrix Review.** *How does the current penalty matrix derive penalty amounts? Should environmental impact and economic benefit be weighted in the matrix? If changes to the matrix are made to include weighting and/or additional considerations of environmental impact and economic benefit of noncompliance, should both be assessed for all penalties? How does EPA calculate water quality penalties? Are changes or additional guidelines on the use of the matrix needed?*

- **Mandatory Penalties.** *Should Ecology adopt and implement policies requiring the issuance of monetary fines for significant and chronic wastewater permit violations?*

- **Municipal Sewer Connection Bans.** *What is the current use of sewer hook up moratoria to achieve municipal compliance? Can that use be strengthened to enhance moratoria as an effective compliance tool?*

- **Designating Priority Violators.** *Are there certain types of violations that are worse than others? What are the characteristics of certain violators that cause Ecology to need to respond?*

- **Public Reporting of the Compliance Program.** *What types of information are useful to the public and groups interested in point source compliance? How can the compliance program be communicated? What should be the frequency of those reports? What types of information would be useful in a periodic report on the compliance program?*

- **Available Staff Resources.** *What are current levels of Ecology enforcement staff resources? Is there currently an unmet need? What are the projected costs associated with implementing the Subcommittee's recommendations?*

Workplan

With Ecology's assistance, the subcommittee established the following generalized, sequential workplan (a more detailed plan was also developed):

> November-December Meetings Objectives: *Orientation of members to perceptional, legal, organizational, and resource aspects of Ecology's water quality enforcement program.*
>
> December-January Meetings Objectives: Understanding of the number and type of formal enforcement actions and the thinking that goes into deciding which action to take.
>
> February-April Meetings Objectives: *Understanding of subcommittee members' views on various policy issues under deliberation.*
>
> May Meeting Objectives: *Question assumptions, learn about interests, and begin preliminary decision-making.*
>
> June Meeting Objectives: *Build on decision making experience and develop draft recommendations.*
>
> July Objectives: *Contemplate draft recommendations and present to Partnership.*

Perceptions

At the first meeting of the subcommittee (November 23, 1998), members conducted a roundtable of perceptions of Ecology's point source enforcement program. Perceptions were freely offered. No attempt was made to "rebut" or "correct" perceptions. Perceptions expressed include:

- *There are no major problems with the existing program. Improvements should be to "tweak" around the edges.*
- *Fixes to the compliance program should be aimed to achieve the best use of available staff resources.*
- *Permits are written using best professional judgments. This results in a disconnect between the permit and what will be emphasized during compliance. That is, permit limits are sent at a 95% confidence level, whereas permittees are expected to be in compliance 100% of the time.*
- *EPA beats up on Ecology and Ecology goes after dischargers.*
- *Ecology should recognize the difference between a discharger in willful violation from one that slips off compliance occasionally.*

- *Enforcement should target repeat violators. Don't believe this is happening given the low number of penalties issued.*

- *Penalties are not always the right tool.*

- *There is no definition of what is "significant." Without it, there is no way of knowing what is the bottom line.*

- *There is an alarming number of violations and a lack of Ecology follow-through.*

- *All violations need to be addressed.*

- *It is hard to establish and adhere to enforcement action thresholds.*

- *Permit writers use "cutting edge" effluent limits. Enforcement is discretionary.*

- *There is inconsistency across offices and differences in how Ecology treats industrial and municipal violators.*

- *The value of penalties is best for repeat violators.*

- *Ecology needs lots of discretion – there are lots of differences among sources.*

- *EPA's "Significant Noncompliance" should not be the only trigger for enforcement.*

- *Environmental damages from violations must be addressed.*

- *Overall, Ecology is doing a good job, given its available resources.*

- *Ecology's enforcement program should be consistent, fair, and firm.*

- *The state needs the enforcement program.*

Case Studies

To help members gain understanding of the decision process Ecology enforcement staff use when deciding on an appropriate enforcement tool, all seven of Ecology water quality enforcement staff briefed the subcommittee on several specific enforcement actions taken. Case studies were presented at the December 15, 1998, and January 14, 1999, meetings of the subcommittee. Staff addressed the following questions in their presentations:

- Facility Name.
- What do you know about the facility's compliance status?
- How did you learn about its compliance status? What means of tracking compliance do you use?

- Did the facility have violations? What kind, if any?
- If there were violations, how would you categorize the violations?
  - Designated EPA's Significant Noncompliance ___
  - Critical: Actual or imminent treat to public health ___
  - Serious: Potential threat to health or environment ___
  - General: No significant threat; marginal ___
  - Repeat violations ___

- Did you take an action (either formal or informal) on the facility? What type of action?

- What factors did you consider in taking the action?

- About many days from discovery of the violation did it take to take the action?

- If you concluded an action was not warranted, how did you conclude that?

- What did the facility do in response to your action?

- If you took an action, did you do any follow-up to see if compliance was achieved?

- Is the facility in compliance now? If not currently in compliance, is there a schedule in place to return to compliance?

- How do you decide what level of compliance is sufficient for you to relax your oversight over a given facility? (i.e., what is an acceptable level of compliance?)

- Knowing what you know now about the facility and the response you took, would you do anything differently?

- Anything else you'd like to add?

Facilities cited in the case studies represented a wide mix of types of violations. Case studies addressed the following topics:

- Unpermitted discharge (non-effluent limit violation);
- Elimination of discharge;
- "Problem" permit;
- High cost administrative order;
- Analytical problem;
- Difficult small municipal problem;
- Small municipal with infrastructure problems;
- Large municipal;
- Industrial stormwater;

- A complex, involved violation;
- Notice of correction resulting in a high cost response from discharger (penalties are not always needed);
- Escalating penalty;
- Sand and gravel action;
- Typical industrial discharge monitoring report problem with complications; and
- Major industrial actions.

In general, the case studies underscored the fact that there are many "opportunities" for facilities to be in violation of various water quality requirements. Each enforcement staff makes recommendations to their supervisor on the formal action to take on the hundreds of facilities they oversee. How they decide what to recommend is critical to the integrity and credibility of the enforcement program. Also, the case studies demonstrated that for many smaller communities, gaining compliance often means spending significant amounts of time working with the community as it addresses its wastewater treatment facilities needs.

In addition to the Ecology enforcement staff case studies, an industrial facility representative of the subcommittee briefed the committee on an enforcement action taken against his facility. He offered the perspective of how it impacted his operations and the fact that an administrative order issued to his facility had a financial impact far above previous Ecology-issued penalties. The subcommittee member emphasized that the ordered action is maybe one to two orders of magnitude larger than what the penalty would have been. He also emphasized that while permit effluent limitations are based on statistical confidence levels assuming noncompliance at least part of the time, enforcement decision thresholds are not based on such statistical standards.

Finally, a municipal representative of the subcommittee acknowledged that for his facility (which was penalized by the department), the public notice to the media announcing the violation and penalty had far more impact on his organization that did the penalty.

Overview of Enforcement Program and Trends

Introduction

The following summarizes background information on the water quality enforcement program's legal section and policy setting, staff resources, and enforcement trends. The subcommittee discussed this information at its November 23, 1998, meeting.

Relevant Sections of Water Pollution Control Act

Certain key sections of the state water pollution control act (Chapter 90.48 RCW) deal with Ecology's water quality enforcement authority. Those are summarized below.

RCW 90.48.010 Policy: "highest possible standards…exercise {state} powers, as fully an as effectively as possible, {to} secure high quality for all waters of the state."
RCW 90.48.030 Jurisdiction: "{Ecology has}…authority to… maintain the highest possible standards of all waters…"
RCW 90.48.037 Enforcement Authority: "{Ecology}…is authorized to bring any appropriate action…"
RCW 90.48.080 Pollution Prohibited: "it {is} unlawful to…cause…pollution of such waters…"
RCW 90.48.120 Notice of Violation and Order: Authorizes notices, orders and directives by the department.
RCW 90.48.140 Penalty: Makes violations a crime and authorizes penalties by the department.
RCW 90.48.142 Liability for damages: Authorizes collection of damages by the state.
RCW 90.48.144 Civil Penalty: Authorizes civil penalties.
RCW 90.48.450 Agricultural Enforcement
RCW 90.48.240 Immediate Action Orders
RCW 90.48.390 Coastal Protection Fund
RCW 90.48.400 Dispersal of Coastal Protection Funds

EPA/State Agency on Compliance Assurance Principles

The water quality enforcement program contains responsibilities as a component of the state's delegated National Pollutant Discharge Elimination System (NPDES). As such, EPA retains oversight duties. The Environmental Protection Agency Region 10 and the four northwest region states (Alaska, Oregon, Idaho, and Washington) signed this document in May 1997. It provides for:

- Collaborative Planning
- EPA Role (delegated states)
- State Role (delegated states)
- Joint Roles
- Performance Measurement
- Oversight
- Information Sharing

Compliance Assurance Agreement

This document is the formal agreement between Washington State and EPA on the administration of water quality enforcement in the state. It was last updated in March 1988 and provides the specific roles, responsibilities and expectations of both agencies, including:

- General Inspection Policies
- Inspection Roles
- Tracking Provisions
- Ecology Roles
- EPA Roles
- Enforcement Policies
- Ecology Responsibilities
- EPA Responsibilities
- Evaluation

Water Quality Program-Specific Guidelines

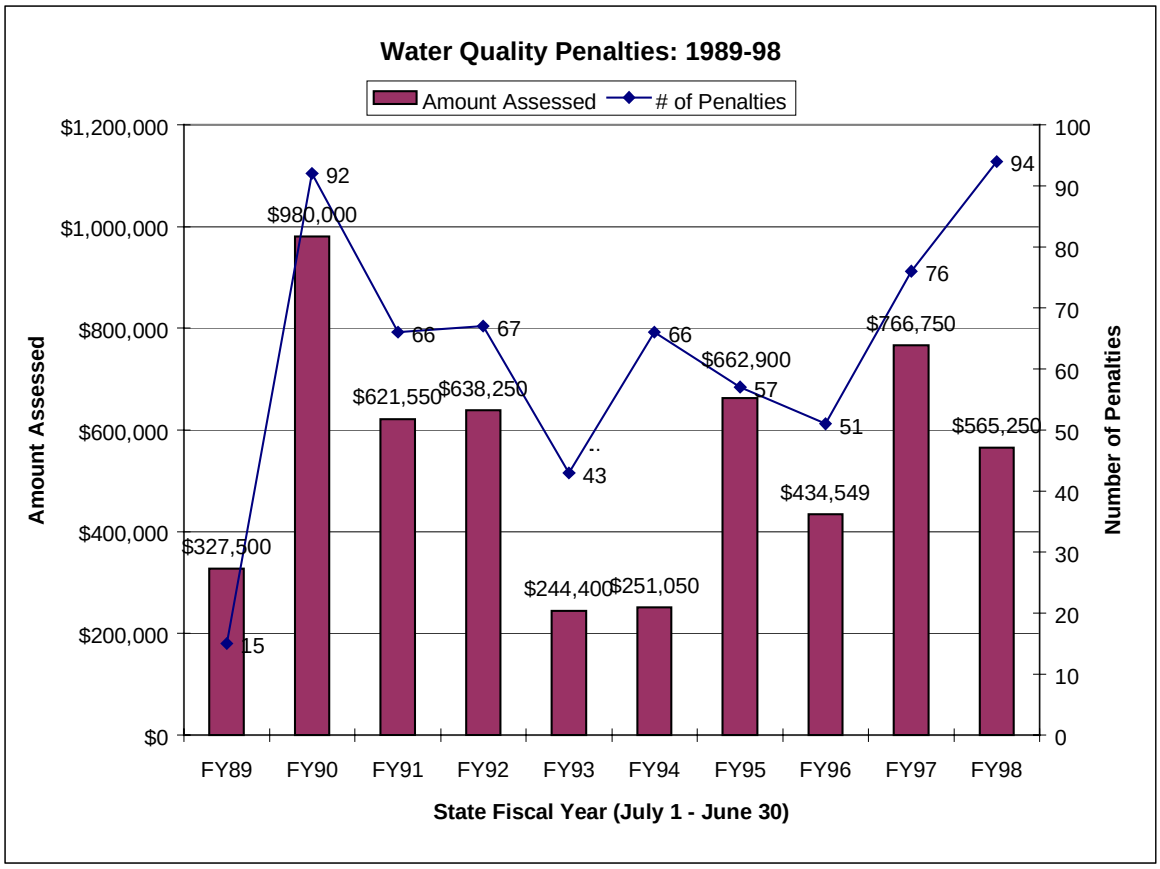
Each Ecology environmental program has program-specific enforcement guidelines for use by its enforcement staff. Each program guidelines must conform to overall agency philosophy and policy on enforcement. The Water Quality Program-specific guidelines were last update in November 1997. Changes, if any, to implement subcommittee recommendations would be incorporated into the program-specific guidelines. The guidelines address:

- Philosophy
- Formal Actions
- Informal responses
- Priorities
- Compliance monitoring
- Escalation
- Documentation
- Timeliness
- General Procedures
- Agricultural Compliance
- Categories of Violations
- Enforcement Tools Use
- Specific Thresholds
- Time Frame
- Determining the Penalty Amount
- Penalties for public entities
- Discretion Allowed

Enforcement Trends

Penalties

The state Water Pollution Control Act establishes penalty maximums at $10,000 per day per violation. Penalties are authorized for violations of water quality standards, violations of wastewater discharge permits, and orders or directives of Ecology.



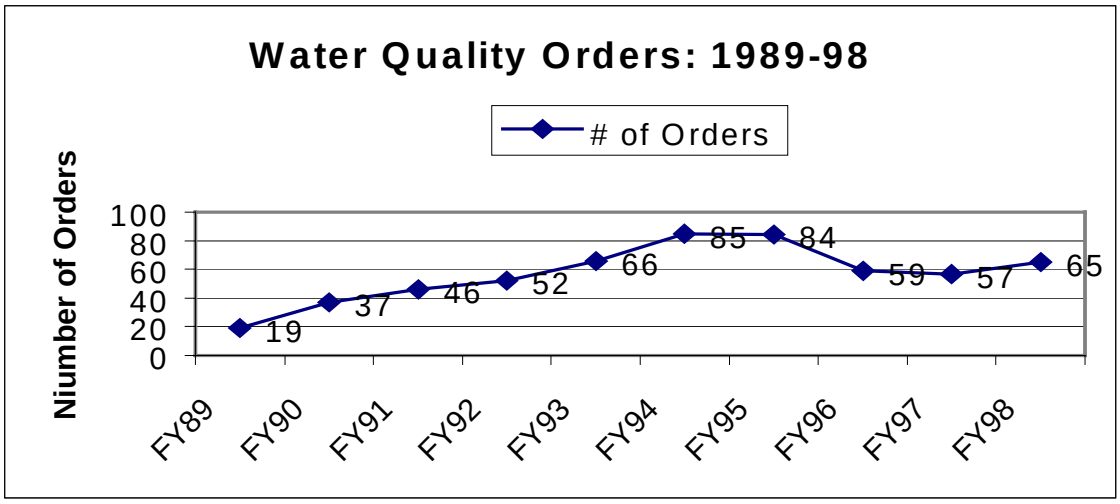
Ecology issues the vast majority of water quality penalties against wastewater discharge permit holders ("point sources"). Currently, Ecology manages the permits of about 4,200 permit holders.

Over the past 10 years, the number of penalties issued by year has generally increased while the amount of penalty assessed has remained essentially the same. 1990 and 1998 had the most number of penalties issued. 1990 also had the most total assessed amount of penalties. Years with the fewest penalties are 1989, 1993 and 1994[4].

[4] Conversely, 1994 had the second most number of administrative orders. See the following charts.

Administrative Orders

Ecology has authority under the state Water Pollution Control Act to compel compliance by use of administrative orders and directives. Orders typically include specific actions and schedules to return to compliance. They can be unilateral or consented to by the discharger. Orders may also stipulate penalties or impose sewer hookup moratoria (for municipal wastewater facilities).

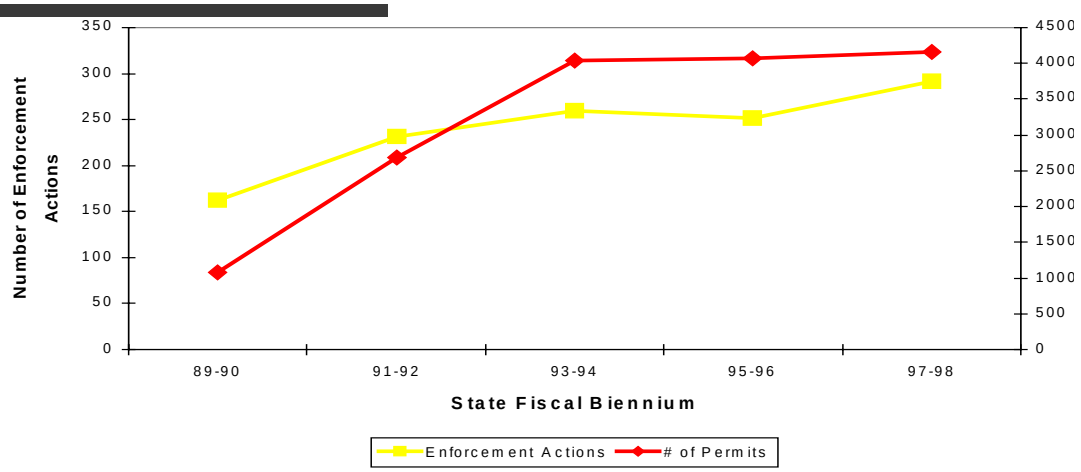


Similar to water quality penalty trends, there has been an overall increase in the number of administrative orders issued during the past ten years. 1994 and 1995 were the years, which had the most orders, issued. The fewest orders issued were in 1989.

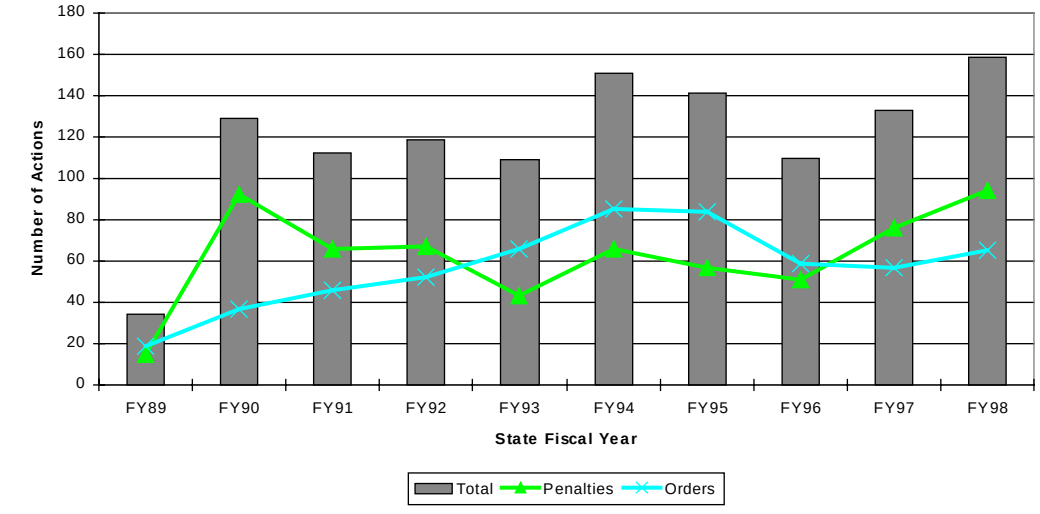
Trends Overall

As the next two charts show, the overall number of enforcement actions shows a slight increase over the past ten years. Notably, during that same time period, the number of permitted facilities has increased from about 1000 in 1989 to over 4400 today. Permittee growth has outpaced enforcement actions since the 1991-92 state fiscal biennium.

Enforcement and Permitting Trends



Enforcement Trends Overall



Treatment of Municipal and Industrial Violators

Subcommittee Discussion Topic: Is there a difference in treatment between municipal and industrial violators? If so, should there be such a difference? Should existing program guidance be revised? How?

Introduction

The Enforcement Subcommittee discussed the following information concerning how Ecology responds to municipal versus industrial wastewater discharge violators at its February 18, March 15, and April 15, 1999, meetings. This draft contains the results of those discussions. Specifically, discussion centered on how current Ecology enforcement guidelines treat the two, whether in fact there is a substantial difference in application of enforcement, and finally if changes were needed to the guidelines. The following summarizes those discussions and provides conclusions of the subcommittee. Attachment 1 gives some relevant statistics on municipal and industrial permittees. Attachment 2 gives excerpts from existing water quality enforcement guidelines as they relate to municipal violators. (There are no comparable industrial distinctions in the guidelines).

Background and Discussion

There are differences in Ecology's existing water quality enforcement guidelines for issuing penalties to municipal violators. Although municipalities are subject to penalties as are industrial violators, the guidelines encourage use of other enforcement actions.[5]

The following table summarizes key statistics regarding compliance and enforcement actions. (All numbers are approximations).

Type	# Required to Report[6] (1998)	% Required to Report (1998)	% Reporting Any Effluent Limit Violation (1997)	% of Total Effluent Limit Violations (1997)	# of Enforcement Actions[7] (1994-1998)
Industrial	1800[8]	84%	75%	50%	794
Municipal	340	16%	25%	50%	175

[5] This is because of the belief that monetary penalties to municipalities, which are public entities, do not have the same effect as on a privately-held business.

[6] Required to submit "discharge monitoring reports" (DMRs).

[7] Only formal enforcement actions are included here and may be taken in response to violations other than effluent limit violations. Does not include technical assistance or informal compliance actions, such as notice of correction, warning letters, phone calls, which are essential compliance tools and are frequently used.

[8] Approximation. There are about 3900 industrial facilities. However, approximately 2,100 of these are industrial or construction sites permit holders that do not have discharge monitoring report requirements.

When comparing the percent of municipal permittees of total permittees (8%) with the percent of total penalties issued to municipalities (6%), it is not clear that there is a significant difference in the percent of total penalties issued in relation to the percent of municipal and industrial permittees.

Additionally, the median penalty amount for municipalities is $3,000, which is the same amount for industrial violators.

The timeliness[9] of enforcement response, however, differs for municipalities as compared with industrial violators. The median duration of penalty issuance for municipal violators is about 83 days, compared with 78 days for industrial violators. The median duration for an administrative order is even longer: one-hundred and nine (109) days for municipal violators compared with 82 days for industrial violator.

Compliance rates[10] also differ. Municipal dischargers as a whole have a compliance rate of 96.4% whereas industrial dischargers as a whole have a compliance rate of 97.5%. Additionally, over the past couple of years, 75% of facilities reporting violations were industrial, whereas 25% were municipal. Those 25% municipal violators reported 50% of the total number of violations.

Finally, there also appears to be a difference in the level of assistance given to municipalities to return to compliance. This was discussed in the enforcement staff case studies to the subcommittee. Additionally, it is imbedded in the distribution of existing staff enforcement resources. Whereas municipal facilities comprise 8% of the total permit universe, about three of the total 7-7.3 (about 40%) enforcement FTEs conduct municipal enforcement actions.

Violations from both of these categories of dischargers can cause human and environmental health impacts. The subcommittee believes that all dischargers need to find ways to overcome barriers to their achieving compliance, including lack of financial resources or expertise.

Large municipalities will have similar capabilities, expertise, and resources to larger industrial permittees. Likewise, small towns and small businesses generally will be lacking in these. Therefore, it makes more sense to structure an enforcement policy, particularly penalty amount, around size differences in permittees and or their discharge amounts rather than whether one is a municipal or industrial permittee.

[9] See "Timeliness of Enforcement Actions" Section.

[10] "Compliance rate": the percent of the number of effluent limits in compliance with, based on the total "opportunities" for noncompliance. Opportunities are the number of effluent limits times the number of reporting period within a given time frame. Note: Some Subcommittee members believe compliance rates are misleading. This is because a facility can be at a very high level of compliance and those limits in violation can still have significant environmental consequences. These members believe a better measure is the number of facilities in violation with their permit. See "Public Reporting of the Compliance Program" Section.

It is also important to recognize differences in the mass of the violation and the sensitivity of the receiving water. A violation of a small amount of material into a large receiving water body with good dilution may have minimum environmental consequences, whereas the small amount into an intermittent stream with little dilution can have significant impacts. Because these factors are so complex, they need to be accounted for on a case-by-case basis in determining the appropriate enforcement tool and size of penalty.

There are means other than penalties, which are effective for achieving compliance. Publicizing noncompliance can been very effective for both municipalities and industries. However, not all members of the subcommittee believe that Ecology should expand its publicizing of violations and enforcement actions. Currently, press releases are issued for "significant" enforcement actions, such as penalties over $10,000. Some members of the subcommittee believe this is sufficient.

When developing the enforcement posture, similar violators should be treated similarly. There are inherent differences between municipal and industrial violators, though. Some of these differences will warrant different responses. For example, sewer hookup moratoria are very effective, possibly more so than penalties, for municipal violators. Existing procedures for issuing moratoria need to be reviewed and strengthened to ensure equity and credibility of the tool. (See "Municipal Sewer Connection Bans" section)

Production curtailments for industrial violators, while presently not used by Ecology, should be considered as well. These actions may be preferable to penalties in some cases. However, it is unclear what the best way to implement production curtailments is. It may be preferable to use a permit (which is not an enforcement action) rather than an administrative order to impose a production curtailment. Irrespective, if used, it is important that the curtailment have a nexus between the cause of the violation and the production being curtailed. Some subcommittee members do not believe this to be so critical and suggest production bans or curtailments should be used with greater flexibility. Other members of the subcommittee do not agree with the use of production curtailments. At a minimum, Ecology should conduct further review into the potential uses of curtailments.

There also needs to be a degree of discretion at the department in order to determine which enforcement action to use for each unique case. However, that discretion should be guided by the principle of similar treatment of violators, distinguishing by such factors as size of discharge, size of business or town, environmental sensitivity, and mass of violation. Enforcement response should not be chosen solely on its status as a municipality or industry.

Innovative settlements should continue to be used in some cases as a means of implementing discretion and deriving the optimum enforcement action for unique violations. However, innovative settlements were initially used in order to direct penalty funds to environmental restoration projects that would otherwise be deposited to the state general fund. Since 1998, though, penalties assessed under the state water pollution

control act have been deposited into the coastal protection account. That account allows for penalty funds to be directed to environmental restoration activities throughout the state. Therefore, the future role of innovative settlements is unclear.

While the number of penalties issued is not an effective measurement of the effectiveness of the enforcement program, it does provide an indicator of the willingness of the department to take actions to deter violations. In this sense, if noncompliance trends continue or increase, the number of penalties issued should also increase. Fines for violations put an economic value on compliance.

Bottom line, a facility designated in significant noncompliance (SNC) should receive some type of enforcement action, regardless of whether it's a municipal or industrial permittee or its size. A difficulty with this assertion is that the subcommittee does not believe the term "significant noncompliance" is adequately defined. EPA's use of the definition is limited and its means of making designations of SNC questionable. Further, it is arguable as to the relevance of the term to attaching meaning to violations. Nonetheless, it is the only national standard of significance in the NPDES program and it is the sole standard EPA uses in its compliance oversight role. (See "Designating Priority Violators" Section)

Subcommittee Recommendations

1. Recommendations are high-level. Members reserve opinions on specifics.
   The following are broad, high-level recommendations to be use by the Water Quality Partnership and the department in considering directions for Ecology's water quality enforcement program. The subcommittee provides these recommendations as high-level policy directions and it and its individual members reserve their future support or opposition for the specific changes that may materialize as a result of these recommendations.

2. All dischargers should be held to compliance with permit requirements. The following factors are important for determining which enforcement action to take and, if a penalty is issued, the size of the penalty:
   - Magnitude and frequency of noncompliance;
   - Size of discharger;
   - Size of discharge;
   - Mass of discharge;
   - Complexity of wastewater infrastructure and nature of institutional setting;
   - Receiving water sensitivity.

   Members of the subcommittee do not believe there should be an automatic difference in how Ecology responds to a violation merely because the violator is a municipality or an industrial facility. Ecology proposes to better define the distinction between municipal and industrial response to noncompliance.

   Some members of the subcommittee prefer using non-penalty enforcement actions to achieve municipal compliance. The subcommittee does not believe this preference

should extend to state agencies. Additionally, the subcommittee recommends Ecology enhance and standardize policy, process and procedures for the use of sewer hookup moratoria as a means for achieving municipal compliance. (See "Municipal Sewer Connection Bans" Section)

The subcommittee recommends Ecology establish certain criteria that if in effect, would result in notices of penalties being issued to municipal or industrial facilities. (See "Mandatory Penalties" Section)

3. The purpose of enforcement is to achieve and maintain compliance. Enforcement actions other than penalties can be effective and should be used. There are actions other than penalties that can be as effective or more effective in gaining compliance. For violations that are due to treatment capacity issues, Ecology should consider sewer hookup moratoria (municipal violators) and production caps or curtailments[11] (industrial violators). Some members of the subcommittee also believe that other tools can be effective in achieving compliance, but that those actions should be in addition to penalties, not in lieu of penalties. Some members of the subcommittee support and some members oppose expanding the publicizing of serious violations, particularly where a penalty is issued.

4. Ecology should use discretion with enforcement but serious violations need to be addressed. Ecology should continue to use its professional discretion in selecting the correct enforcement tool for each unique case regardless of the type of discharger, particularly with respect to first time, non-chronic or non-serious violations. However, Ecology should take formal enforcement actions for all significant noncompliance violations. Some members believe that at a minimum, that action be a penalty. Generally, similar violators should be treated similarly with whatever is the appropriate deterrent method based on the nature of the violation and violator. However, some members of the subcommittee believe that given the broad remedial purposes of the Clean Water Act, occasional individual unfairnesses are contemplated in order to further the Act's purposes.

   Importantly, there needs to be an understanding of what is a "serious"[12] violation.

[11] Provided that the curtailment or cap is related to the cause of the violations. Some members believe industrial curtailments should be only used for new production. Other members believe curtailments should be used against existing production as well.

[12] Defined as a "priority violator" by the subcommittee. See "Designating Priority Violators" Section.

ATTACHMENT 1 to MUNICIPAL/INDUSTRIAL TREATMENT
Statistical Differences of Municipal and Industrial Permitted Universe

Number of Permits (as of December 1998)

	Municipal		Industrial		TOTAL
Individual	322	38%	521	62%	843
General	18	1%	3354	99%	3372
TOTAL	340	8%	3875	92%	4215

Number of Enforcement Actions (1/94 – 9/98)

ENFORCEMENT ACTIONS (1/94 - 9/98)						
	Municipal		Industrial		TOTAL	
Penalties (38%)	22	6%	339	94%	361	**Median Penalty Amount (all) = $3,000. Median Penalty Amount (Muni) = $3,000. Median Penalty Amount (Ind) = $3,000.**
Orders (36%)	96	27%	255	73%	351	
NOVs (26%)	57	22%	200	78%	257	
TOTAL	175	18%	794	82%	969	

Number of NPDES Majors in SNC (1994 – 1998)

Number of NPDES Majors in SNC, 1994-1998			
	Total Majors	In SNC	
Municipal (52%)	44	17	39%
Industrial (48%)	41	22	54%
Total	85	39	46%

- Timeliness of enforcement: Penalties--78 days total. 83 days municipal, 78 days industrial; Orders—83 days total. 109 days municipal, 82 days industrial
- Percent Compliance: 96.8% total. 96.4% municipal, 97.5% industrial
- Violations: 75% were industrial facilities (50% of total violations). 25% were municipal facilities (50% of total violations).

ATTACHMENT 2 to MUNICIPAL/INDUSTRIAL TREATMENT

EXCERPT FROM Current WQ-Specific Enforcement Guidelines Regarding Treatment of Municipal Violators[13]

"C. Penalties for Public Entities

Public entities are subject to issuance of civil penalties to the same extent as any other individual or organization unless specifically exempted from such authority by law. **Provided, however, that public entities that are experiencing chronic, as opposed to one-time incident, violations (e.g., repeated permit violations due to overloading at a publicly-owned wastewater treatment plant), must be provided formal or informal written notice of their potential liability for civil penalties prior to the initiation of penalty action. [Emphasis added]**

In addition, the purpose of a penalty is to achieve compliance and change behavior**. Penalties may not be the best way to accomplish this for public entities. A penalty to a state agency for example simply moves funds from one part of state government to another. Penalties to a municipal entity may have an impact on the treatment plant's operating budget with undesirable environmental consequences thereby precipitating potential for increased penalties. Elevation of the issue within the entities' organization; sewer connection bans; court actions; or public notice of violations can be more effective with public entity violations than penalties. Discretion is therefore allowed on use of penalties for public entities. [Emphasis added]**

This provision does not apply to willful or negligent acts, which result in incidents of violation.

"XIII. USE OF DISCRETION IN DETERMINING THE OPTIMUM APPROACH

There are five broad areas where staff have and are expected to use professional discretion:

A. actions taken for non-significant violations (i.e., marginal permit exceedances or non-aggravated emissions);
B. the use and terms of administrative orders (consent or unilateral);
C. escalating penalties for multiple facilities contributing to a single discharge or emission point;
D. justification of deviations from policy or guidelines; and
use of penalties for public entities. [emphasis added]

"D. Deviations From Guidelines

Professional staff may justify deviations from these guidelines at their discretion. The justification for such deviations should be written up as part of the documentation that goes with a recommendation for enforcement action for

[13] Note: There are no comparable passages for industrial violators.

review by the party having signature authority. If the deviation involves not taking an enforcement action that would otherwise be required, then such justification should be reviewed with the person with signature authority for the action.

In addition, staff have flexibility to deviate from these guidelines to ensure that, if necessary, higher penalties than which would otherwise have been determined using these guidelines can be imposed for the state's largest dischargers, due to their complexities, nature, and/or size, in order to achieve compliance.

Staff should understand they are encouraged to exercise this discretion, but their justification will be carefully reviewed and may not be accepted. If the deviation from the guidelines is not accepted, the responsible staff will be so informed and will be responsible for supporting the enforcement action that is taken.

"E. <u>Use of Penalties for Public Entities</u>

Staff should use discretion to decide if compliance can be better achieved at publicly-owned facilities through compliance responses other than penalties, such as sewer hookup moratoria, publicly announcing the non-compliance, elevating the violation throughout the organization of the entity, or some other means. Often, these means can be effective in achieving compliance, which is the goal Ecology's compliance program. In determining the optimum approach to non-compliant public entities, staff should consider local conditions, resources, and other factors." [Emphasis added]

Timeliness of Enforcement Actions

Subcommittee Discussion Topic: Is Ecology responding in a timely manner to violations? Should existing program guidance be revised to reflect current response times?

Introduction

The Enforcement Subcommittee discussed whether enforcement actions are timely relative to violation discovery at its June 9, 1999, meeting. This section contains the results of those discussions. Specifically, discussion centered on what current Ecology enforcement guidelines suggest should be the response time from violation discovery and what the median duration actually is for penalty and administrative order issuance.

Background and Discussion

Current Water Quality Program enforcement guidelines state:

> *"As a general objective and guideline, enforcement actions or compliance responses should be taken in 45 days or less from the date of detection of the violations. Initial formal enforcement actions* [including penalties and administrative orders] *should be taken as soon as possible, but not later than 90 days from the date of detection of the violation, unless adequate justification for delay exists. Significant violations must result in formal enforcement response as expeditiously as possible, but not later than 30 days from date of detection."* [Emphasis added]

The following is based on an analysis of penalty and administrative order actions taken January 1996 through December 1998. During that time, there were 256 water quality penalties and 189 orders issued. The following tables summarize this analysis.

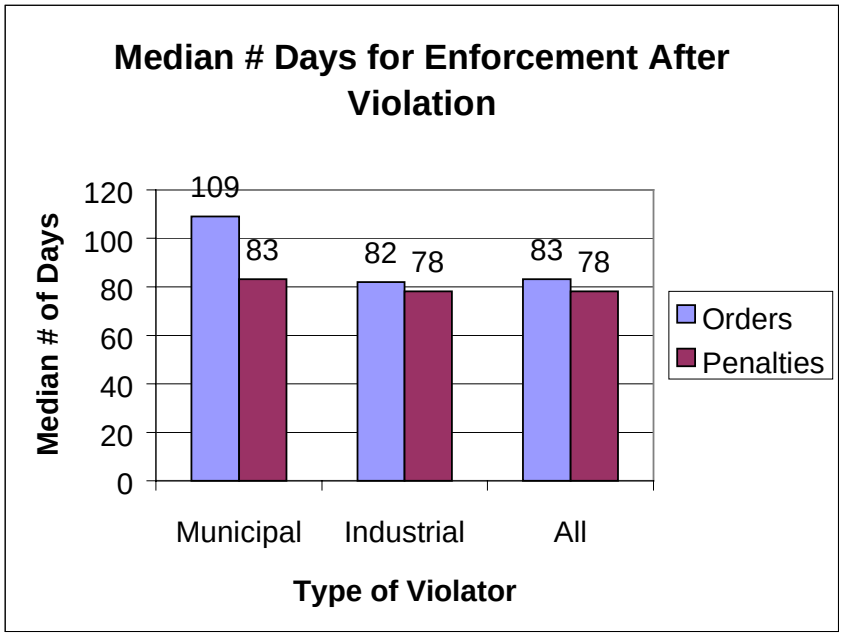
Penalty Issuance

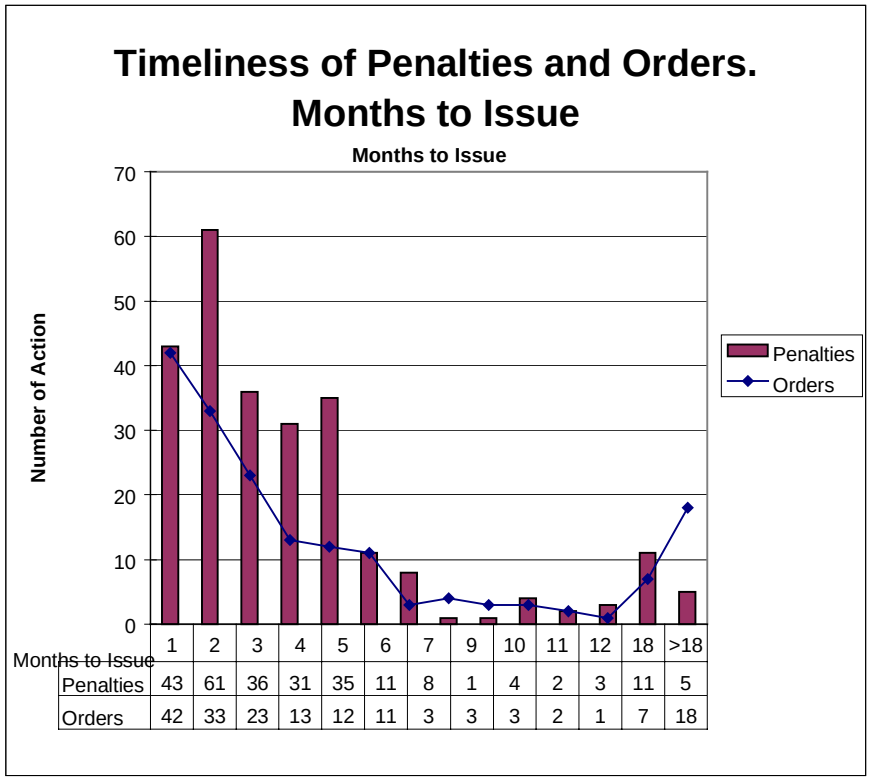
The median number of days is about **76 to 78 days** to issue a water quality penalty from when a violation is detected. The shortest duration reported between violation and penalty issuance is one day. The longest reported is 6,965 days. There were several "outliers" that required more than one year.

Administrative Order Issuance

It lakes longer to issue an order than to issue a penalty. The median number of days between violation and order issuance for any violator who received an order is **83 days**. This compares with the median number of days for penalty issuance of **78 days**.

It takes significantly longer to issue an order to a municipality (median of **109 days**) compared with an industrial violator (median of **82 days**). It also takes longer to issue a penalty to a municipality (median of **83 days**) compared with an industrial violator (median of **78 days**). These results tend to support a perception that Ecology exercises more tolerance with municipal violators than industrial violators.





Months to Issue	1	2	3	4	5	6	7	9	10	11	12	18	>18
Penalties	43	61	36	31	35	11	8	1	4	2	3	11	5
Orders	42	33	23	13	12	11	3	3	3	2	1	7	18

Outliers

16 of the 256 penalties (6.3%) took longer than one year to issue from violation. Twenty-five of 189 orders (13.2%) took longer than one year to issue from violation. Those enforcement actions are attached to this memorandum. Of the actions that took greater than one year, only one was a penalty to a municipality (6%) and 11 (44%) were orders to municipalities. Ecology is currently reviewing why each of those actions took over one year from violation to issue and to see if the data in the enforcement database are accurate. The results of this finer review would be used to identify common burdens/issues which caused the excessive duration. These in turn could generate recommended process improvements.

Subcommittee Recommendations

1. The subcommittee finds when Ecology takes an enforcement action it is generally timely. The subcommittee recommends Ecology's enforcement guidelines be revised to reflect median duration of actions.

2. The subcommittee recommends Ecology better define the data definition "date violation detected" and ensure standard use.

Penalty Matrix Review

Subcommittee Discussion Topic: How does the current penalty matrix derive penalty amounts? Should environmental impact and economic benefit be weighted in the matrix? How does EPA calculate water quality penalties? Are changes or additional guidelines on the matrix use needed?

Introduction

This section reviews and makes recommendations on the use of Ecology's water quality penalty matrix. In December 1998, several questions were posed to Ecology point source enforcement personnel regarding use of the existing penalty matrix. The matrix is used to determine the penalty amount after Ecology has determined a penalty is appropriate. It is not used to determine if a penalty is to be issued -- rather, what the penalty amount should be. The responses are included in the appendix.

The responses to those questions, together with the penalty matrix and other supporting information, were discussed by the Water Quality Partnership of the Enforcement Subcommittee at its February 18, March 15, May 26, and June 9, 1999, meetings. Specifically, discussion centered on whether environmental impact and/or economic benefit considerations should be weighted in the penalty matrix, how EPA determines size of its penalties, and what changes could be made to enhance the matrix's effectiveness. The following summarizes those discussions and provides conclusions of the subcommittee.

Background and Discussion

Ecology's Water Quality Penalty Matrix

After Ecology has decided to issue a penalty for a water quality violation, enforcement staff calculate the penalty amount using a penalty matrix. Penalty maximums are set by the state's water pollution control act at $10,000 per day per violation. This penalty maximum has remained constant over many years without any adjustment to reflect inflation. The penalty matrix is used to determine the per violation amount up to the statutory maximum.

The existing penalty matrix is Attachment 1. Attachment 2 provides Ecology enforcement staff feedback on the use of the matrix.

The matrix uses a series of questions designed to help determine the amount of a civil penalty. The matrix includes considerations of:

- Public health risk;
- Environmental damage;
- Willful or knowing violation;
- Unresponsive in correcting violation;
- Improper operation or maintenance;
- Failure to obtain necessary permits; and
- Economic benefit from noncompliance.

For each of these criteria, enforcement staff assign the following:

- No: 0 points;
- Possibly: 1 point;
- Probably: 2 points; and
- Definitely: 3 points.

The points are totaled and total points are compared with penalty amounts as follows:

Rating	1-2	3-4	5-8	9-11	12-14	15
Penalty	$500 *	$1000	$2000	$3000	$4000	$5000

Rating	16	17	18	19	20
Penalty	$6000	$7000	$8000	$9000	$10000

Footnotes to the matrix provide further guidance:

- For each violation multiply the penalty amount by the duration of violation, e.g., number of days, weeks, months, etc.

- If the facility has a history of documented violations and previous penalties, apply a multiple of three to the previous penalty.

- The minimum amount for a major industrial facility is $1,000. The entire matrix may be varied for largest, most complex dischargers.

Finally, if staff find that a violator “definitely" realized economic benefit from noncompliance, staff are to include any documentation and calculate a penalty based on that economic benefit. There is no guidance as to how this economic benefit is to be determined or penalty amount calculated based on.

Observations

- The penalty matrix serves its intended purpose.
- The penalty matrix is simplistic and qualitative.
- Environmental or health impacts are not weighted over other criteria.
- Economic benefit is potentially weighted over other factors, since it is contained as a criterion as well as added after a penalty amount is determined.

- There is no guidance as to how economic benefit is to be determined or assessed.
- The matrix requires a score of 75% of the total available points to reach 50% of the statutory penalty maximum.
- The matrix results must be adjusted through a multiplier in order to account for past violations.
- The matrix results may be adjusted for the "largest, most complex" violators.
- The matrix does not work well for "significant" one-time event violations.
- The matrix does not work well for "minor," "small discharge" violations warranting penalties.
- The matrix works well for mid-range penalties but not well for larger penalties.
- The matrix does not specifically consider mass loading or sensitivity of the receiving water body.
- The matrix is limited by a static statutory penalty maximum.

EPA's Penalty Matrix

EPA is authorized to issue administrative penalties up to $10,000 (CWA) per violation and judicial penalties up to $25,000 under the federal clean water act. Additionally, in 1996, Congress enacted the Debt Collection Improvement Act, which specifically allows for inflationary adjustments to these maximums. As a consequence, EPA's penalty maximums are now $11,000 and $27,500 for administrative and judicial penalties respectively, reflecting a 10% inflationary adjustment.

To determine the penalty amount, EPA uses a couple of methods. One is to issue a penalty at the statutory maximum. Another is to issue a penalty that has been calculated at about 20% above a settlement amount. There appears to be regional differences is which of these two approaches are used and Region 10 has indicated they do not have a standard, preferred approach.

However, the process used to determine the amount EPA may settle for is established in EPA's "*Interim CWA Settlement Penalty Policy – March 1, 1999*." That policy contains a penalty calculation methodology that uses the following formula:

Penalty = Economic Benefit + Gravity +/- Gravity Adjustment Factors – Litigation Considerations – Ability to Pay – Supplemental Environmental Projects.

Economic Benefit

Every effort is to be made to calculate and recover the economic benefit of noncompliance. Commonly delayed and avoided CWA pollution control expenditures include:

- Monitoring and reporting;
- Capital equipment;
- Operation and maintenance; and
- One-time acquisitions.

EPA uses the "BEN Model" for determining the economic benefit of noncompliance. The BEN Model is a Windows-based computer program. It may be downloaded over the internet at the following site:

www.indecon.com

Region 10 compliance staff report this is used in all penalties issued in that region.

Gravity Component
After the economic benefit is calculated, it is added to a gravity component. The gravity component is:

Monthly gravity component = (1+A+B+C+D) X $1,000 where:

A = "Significance of violation" (derived through a matrix in the EPA policy);
B = "Health and environmental harm" (derived through a matrix in the EPA policy);
C = "Number of effluent limit violations"; and
D = "Significance of Non-effluent limit violations (derived through a matrix in the EPA policy).

Gravity Adjustment Factors
The amount determined under the gravity component may be adjusted for the following:

Flow Reduction for Small Facilities:

Flow (gpd)	% Reduction of Total Gravity
< 5,000	50
Between 5,000 and 9,999	40
Between 10,000 and 19,999	30
Between 20,000 and 29,999	20
Between 30,000 and 49,999	10
Between 50,000 and 99,999	5
100,000 and over	0 (i.e., no reduction)

Other gravity adjustment factors are:

- History of Recalcitrance Adjustment Factor;
- Quick Settlement Adjustment Factor; and
- Environmental Auditing Adjustment Factor.

Litigation Considerations
After the economic benefit plus the gravity component (plus or minus the gravity adjustments) is determined, EPA applies litigation considerations. Included in these considerations is a "national municipal litigation consideration." This consideration uses economic benefit, population, and other factors in determining adjustments to the penalty amount.

Observations

- EPA's penalty calculation method is focused on determining settlement amounts, not initial penalty amounts.
- EPA applies the statutory maximum or targets an amount about 20% above settlement amount.
- Economic benefit is a key required element of the method.
- The method makes decisions relative to the "significance" of the violation.
- The method considers flow but not mass or sensitivity of receiving water body.
- The method considers quantitative as well as qualitative effluent limit violations (i.e., percent exceedances, number of exceedances, and toxics vs. convention/nonconventional limit violations).
- The method is slightly more quantitative in its treatment of environmental or human health harm potential that Ecology's matrix.
- The method allows for penalty reductions for:
  - small discharges;
  - quick settlements;
  - environmental auditing;
  - litigation considerations.
- The method is limited by statutory maximums, but those maximums contain inflationary adjustments.

Specific Discussion Question: Environmental Impact Consideration

Should environmental impact (including specifically addressing Endangered Species Act (ESA) listed species) from violations be weighted in the matrix?

Options Discussed by Subcommittee

- Add specific, Water Quality Program-generated environmental conditions to replace the current general environmental criterion.
- Add aquatic systems sensitivity scores that are included in the Spills Prevention, Preparedness and Response Program's penalty matrix (derived from its Natural Resource Damage Assessment model).
- Add ESA listing factors.
- Others?

Subcommittee Discussion

There should be some consideration of the impact of the violation. It cuts both ways (upwards and downwards). Its not clear how impact could be included. There are models out there, such as Natural Resource Damage Assessments and a method used by National Oceanic and Atmospheric Administration and EPA. However, the purpose of the penalty is to obtain compliance – not necessarily to pay for damaged resources. There are other means of accomplishing that.

Add qualitative considerations of environmental impact to the penalty matrix. Check with other examples of how impact is factored.

Specific Discussion Question:
Economic Benefit for Noncompliance

Should economic benefit for noncompliance be given more specific consideration and/or weighted in the matrix?

Options Discussed by Subcommittee:

- Add specific, Water Quality Program-generated economic benefit considerations to replace the current general criterion.
- Remove existing general criterion from matrix and calculate using EPA's BEN model.
- Add additional consideration to matrix using BEN model's "illegal competitive advantage" questions, but not the model itself.
- Others?

Subcommittee Discussion

The only thing the matrix should consider is whether there is economic benefit realized through noncompliance. The matrix already considers economic benefit in two places: in the scoring component and if the answer is yes. There should be some consideration of economic benefit considerations, but there is not agreement on how much and when. Retain the existing optional consideration of economic benefit in the matrix and use it where it is appropriate. It is not needed in all cases.

Specific Discussion Question:
Applying environmental impact and economic benefit.

If changes to the matrix are made to include weighting and/or additional considerations of environmental impact and economic benefit of noncompliance, should both be assessed for all penalties?

Options:

- Apply both in all penalties.
- Screen penalties for both; apply the larger of the two.
- Apply on a case by case basis.
- Others?

Subcommittee Discussion

Environmental impact should be considered in the penalty matrix in all penalties. Economic benefit should be only as appropriate.

Subcommittee Recommendations

1. The subcommittee recommends that in order to avoid a wide disparity of penalty amounts for similar violations, use of the penalty matrix should be made standard operating procedure.

2. The subcommittee recommends that the penalty matrix be revised to address its recognized limitations. Specifically, the matrix should be revised to:

   - Derive small-sum penalties with minimum of adjustment for small or minor violations for which a penalty is the best means to achieve compliance;
   - Derive large-sum penalties within the statutory maximum with minimum adjustment for larger or major violations for which a penalty is the best means to achieve compliance;
   - Incorporate or eliminate the need for the footnotes to the existing matrix; and
   - Better align scores of the matrix to dollar amounts so that the current inherent bias for small penalties is removed.

3. The subcommittee is divided on whether to recommend that Ecology require the consideration of economic benefit in all cases. Some members believe it should be optional on the part of enforcement staff. Other members believe it should be mandatory for all penalties. Whenever economic benefit is considered, however, the subcommittee recommends it be considered consistently. Therefore, the subcommittee recommends Ecology investigate the use of and obtain training of EPA's BEN model for calculating economic benefit, consistent with state law.

4. In addition to the above-recommended changes to the matrix, the subcommittee recommends that Ecology also should:
   - Determine if the "tripling" multiplier can be worked into the penalty matrix or if additional guidance to achieve consistent use of the multiplier is needed;
   - Determine if and how the mass amount of the violation, environmental significance of the violation, and the sensitivity of the receiving water could be incorporated into the matrix;
   - Determine if additional qualitative factors for environmental impact could be incorporated into the matrix.

ATTACHMENT 1 to PENALTY MATRIX REVIEW

EXCERPT FROM Current WQ-Specific Enforcement Guidelines Regarding Existing Penalty Matrix

"XII. DETERMINING CIVIL PENALTY AMOUNT

"A. **Decision Flow Process**

The following is a series of questions and guidance designed to help determine the amount of a civil penalty. In responding to these questions, staff may choose to substantiate answers in either the "additional comments" section on page 1 or in the Recommendation for Enforcement. The answers are placed in Table 1. The numeric value derived in Table 1 is used in Table 2 to determine the size of the penalty.

1. Did the violation result in a public health risk?

Answer "no" if there is no evidence to support a claim of public health risk.
Answer "possibly" if a public health risk can be inferred from evidence and knowledge of the effects of the violation.
Answer "probably" if evidence supports a claim of public health risk and there is a plausible connection between this violation and the health or effect.
Answer "definitely" if there is direct evidence linking public health risk or adverse effects with the violation.

2. Did the violation result in environmental damage?

Answer "no" if there is no evidence to support a claim of environmental damage or impairment of beneficial uses.
Answer "possibly" if environmental damage or impairment of beneficial uses can be inferred from evidence or knowledge of the effects of the violation.
Answer "probably" if there is evidence to support a claim of environmental damage or impairment of beneficial uses and there is a plausible connection between the violation and the damage/impairment.
Answer "definitely" if there is direct evidence linking demonstrable environmental damage or impairment of the beneficial uses with the violation.

3. Was it a knowing violation?

Answer "no" if the violator obviously did not know that the action or inaction constituted a violation.
Answer "possibly" if it is likely the violator knew. Answer "probably" if the violator should have known.
Answer "definitely" if the violator clearly knew. If the answer is "definitely," consider consulting with the environmental crimes unit.

4. Was the responsible person unresponsive in correcting the violation?

Answer "no" if the violation was corrected as soon as the responsible person learned of it.
Answer "possibly" if the violation was corrected in a less timely and cooperative fashion.
Answer "probably" if the responsible person attempted to correct the problem but did not correct it.
Answer "definitely" if the responsible person made no attempt to correct the violation.

5. Was the violation a result of improper operation or inadequate maintenance? (I.e., BMPs, pollution prevention plans, operation and maintenance (O&M) plans)

Answer "no" if the violation was not the result of improper operation or inadequate maintenance.
Answer "possibly" if the facility has an O&M plan, PPP, or BMP manual that is out of date or inadequate.
Answer "probably" if there is no O&M plan, PPP, or BMPs developed for the facility.
Answer "definitely" if the facility has no plans or is not following its plan AND the violation was clearly the result of improper O&M.

6. Did the facility fail to obtain the necessary permits and approvals to operate at the time of the violation?

Answer "no" if the paperwork was complete and appropriate for the job or task that caused the violation.
Answer "definitely" if the facility did not have all the required permits and approvals for the job or task that caused the violation.

7. Did anyone benefit economically from non-compliance? The costs that may have been avoided include engineering costs, permit fees, operation and maintenance costs, interest, equipment and construction costs.

Answer "no" if it is clear that no one obtained an economic benefit.
Answer "possibly" if someone might have benefited.
Answer "probably" if anyone benefited, but the benefit is not quantifiable.
Answer "definitely" if the economic benefit is quantifiable.

"**B. Penalty Calculation**

TABLE 1
Gravity Criteria

	NO (0)	POSSIBLY (1)	PROBABLY (2)	DEFINITELY (3)
1. Public Health Risk?	___	___	___	___
2. Environmental Damage?	___	___	___	___
3. Willful or Knowing Violation?	___	___	___	___
4. Unresponsive in Correcting Violation?	__	___	___	___
5. Improper Operation or Maintenance?	___	___	___	___
6. Failure to obtain necessary permits	___	___	___	___
7. Economic Benefit from Noncompliance?	___	___	___	___

Total Rating Points _____

TABLE 2
Gravity Component Penalty#

Rating	1-2	3-4	5-8	9-11	12-14	15
Penalty	$500 *	$1000	$2000	$3000	$4000	$5000

Rating	16	17	18	19	20
Penalty	$6000	$7000	$8000	$9000	$10000

For each violation multiply the penalty amount by the duration of violation, e.g., number of days, weeks, months, etc.

If the facility has a history of documented violations and previous penalties, apply a multiple of 3 to the previous penalty.

May be varied for largest, most complex dischargers.

- If this is for a major industrial facility = $1000.

“TABLE 3
Economic Benefit Penalty

If the answer to question #7 in Table 1 is "Definitely," include any documentation and attach calculations.

Total Recommended Penalty Amount $
Based On: Matrix [ ]
Economic Benefit [ ]
Both [ ]”

ATTACHMENT 2 to PENALTY MATRIX REVIEW

Ecology Point Source Enforcement Personnel Responses Regarding use of the Existing WQ Penalty Matrix.

What are the major factors used in the matrix?

NWRO municipal:

- Public Health Risk
- Environmental Damage
- Willful or Knowing Violation
- Unresponsive in Correcting Violation
- Improper Operation or Maintenance
- Failure to obtain necessary permits
- Economic Benefit from Noncompliance

Section 309(g) [federal Clean Water Act] specifically addresses factors to be taken into consideration when setting administrative penalty amounts. The factors include the nature, circumstances, extent, and gravity of the violation as well as ability to pay, prior history, degree of culpability, and economic benefit. Not all the factors are taken into consideration (ability to pay).

NWRO industrial:
In my opinion, the penalty matrix is the most scientific method of fairly and consistently establishing a penalty assessment.

SWRO industrial:
They [penalty matrix factors] appear to be very similar to the factors that should be used to determine a penalty amount according to Section 309(g)(3) of the Clean Water Act.

Is the matrix used all the time?

NWRO municipal:
I always use the matrix to begin the process of determining the proper penalty amount. Management makes the final determination regarding the final penalty amount set and the manner in which the penalty matrix was used.

NWRO industrial:
Yes, on penalty assessments.

SWRO industrial:
No, if justified we can assess more or less than the amount determined by the matrix.

ERO industrial/municipal:

We run all penalties through the matrix and usually follow the amount we get. The goal of the matrix is to provide consistency between penalties. We do not use it to evaluate every violation to see if a penalty is warranted. The purpose of a penalty is to get the violators' (and others') attention and to make them change their actions. The amount it takes to get someone's attention depends on the size and economic base of a facility. A penalty must be large enough to not allow it to be a "cost of doing business" and it can not be too large (for small towns) it makes it impossible to fix their problems.

If not used all of the time. When is it used?

SWRO industrial:
At SWRO it is used nearly all the time unless a major pollution event occurs that represents one violation, then the statutory maximum is assessed. Recently the Regional Director and Program Manager expressed a concern that a penalty calculated by the matrix was too high, we were asked to go back and calculate the economic benefit and see if we could use that instead. This resulted in a penalty larger than the one calculated using the matrix.

ERO industrial/municipal:
It works best for the middle-sized penalties ($2,000-7,000).

What factors play into not using it?

NWRO municipal:
The primary purpose of a penalty is to deter future violations. Management makes the final determination regarding the size of a penalty and its ability to serve this function. Staff use their best professional judgement to follow guidance provided by the WQP management and prepare a defendable case that is based on laws, regulations, policy, and guidance. In the case of a municipal entity, the size of the penalty can sometimes be lower and continue to serve as an effective deterrent to future violations, as public and political embarrassment are factors. These decisions are made on a case by case basis. Ability to pay might be a factor if an entity clearly does not have the economic means to pay a large penalty and perform critical improvements that are needed to serve the public good.

NWRO industrial:
N/A

SWRO industrial:
Major pollution events that represent one violation, direction from superiors to use something else.

ERO industrial/municipal:
Economic benefit from non-compliance also needs to be considered. Number of violations: Multiple days of low point penalties will give a total penalty that is higher than reasonable looking at environmental damage done. In these instances it is best to

penalize for only some days. If a permit has a monthly average limit, we could penalize them for 30 days violation, but this will not be reasonable most times. Size of facility/discharge. The size of discharge and amount of environmental damage are not significant in the difference in number of points a violation gets from the matrix. A single day major environmental damage event doesn't always get enough points compared to the damage done. Also, the motivation gained from a penalty and the environmental damage done usually varies depending on the size of the facility (for example, a $1,000 penalty is significant to a small town, but will make little difference to Seattle). Management decisions.

Does it work as is or do we have to adjust our use of it to derive the "right" penalty?

NWRO municipal:
The matrix does a good job of determining the proper penalty amount. Because the scoring method has subjective elements, it is possible for different users to arrive at different amounts. Generally, several staff fill out the matrix in support of a collaborative internal discussion of the final penalty amount.

NWRO industrial:
The penalty matrix works very well when having to present and justify penalty assessments in hearings before the PCHB.

SWRO industrial:
I feel it works very well; it provides consistency and justification of a penalty amount in hearings before the PCHB. It can be used in different ways and often must be used very conservatively to arrive at an amount small enough to be approved for signature.

ERO industrial/municipal:
It doesn't work all the time. We have to adjust it for economic benefit from noncompliance and to better address environmental damage done. This is allowed in the matrix as written. It works best for the middle-sized penalties ($2,000-7,000). It is too easy to get points to justify a less than $2,000 penalty on points alone. It is also too hard to get enough points to justify a maximum penalty. The purpose of a penalty is to get the violators' (and others') attention and to make them change their actions. The amount it takes to get someone's attention depends on the size of a facility, which usually correlates with damage done, but doesn't get enough weight in the matrix.

Are there other factors used in determining the penalty amount? What are they?

NWRO municipal:
If you consider the determination of economic benefit a separate process, then that would be an important factor to consider. The contribution of remarkable weather events might be taken into consideration.

NWRO industrial:
Yes. Economic benefit determined by EPA BEN computer model or other appropriate method. For each violation multiply the penalty amount by the duration of violation, e.g., number of weeks, months, etc. If the facility has a history of documented violations and previous penalties, apply a multiple of 3 to the previous penalty.
SWRO industrial:
Major pollution events representing one violation, economic benefit.

ERO industrial/municipal:
Size of discharge. Large volume discharges major damage events to not get adequate points in the matrix. Multiple days can be used to increase the penalty, but don't work on catastrophic single day events. We can issue an Order that costs more than any penalty possible. This way the money is spent to fix the problem. Small, less than $2,000 total, penalties are not usually worth the time it takes us and the AGs.

Are there factors in preventing the matrix from deriving the "right" penalty?

NWRO municipal:
There are no glaring problems with the matrix. It provides a good framework for building statewide consistency in determining penalty amounts. It also provides flexibility for staff as they review the available data for each action and prepare to defend each action (on a case by case basis) at the Pollution Control Hearings Board.

NWRO industrial:
No.

SWRO industrial
Deriving a penalty amount too high for signature. The Industrial Section says they have to deviate to get a penalty that is large enough to make their facilities correct problems

ERO industrial/municipal:
Environmental damage, size of discharge, and potential environmental damage do not get enough weight in the matrix. One method to increase a penalty to a "right" amount is to find more violations to multiply by.

Other thoughts?

ERO industrial/municipal:
Please [be aware] that the matrix is used when a penalty is warranted and should not used to generate mandatory penalties. Also, an order is a more effective way to get things fixed.

We use the matrix in an attempt to be consistent, but don't always follow it blindly.

Mandatory Penalties

Subcommittee Discussion Topic: Should Ecology adopt and implement policies requiring the issuance of monetary fines for significant and chronic wastewater permit violations?

Introduction

The Enforcement Subcommittee discussed the following information concerning whether there is a role for mandatory penalties in water quality enforcement at its April 15, and May 13, 1999, meetings. This section contains the results of those discussions. Specifically, discussion centered on what two other states are doing, or contemplating doing with respect to mandatory penalties. Several options aimed at retaining; enhancing or eliminating enforcement discretion were discussed.

Background and Discussion

Existing Water Quality Enforcement Guidelines

Current state and federal clean water laws authorize Ecology to issue monetary penalties for permit violations. Current program-specific guidelines require mandatory civil penalties for specific situations. In practice, however, enforcement staff use penalties as one of several compliance actions and are authorized and encouraged (particularly with respect to public entities) to deviate from "mandatory penalty" conditions.

According to existing program-specific guidelines, penalties are "mandatory" for:

- Significant violations;
- Violations of orders on critical or serious violations;
- General violation repeated within two years of a penalty, November, or order;
- Failure to submit NOV-required reports; and
- Knowing violations.

Other circumstances where penalties are "mandated" unless there is written justification, there is insufficient evidence, or where penalties would jeopardize a criminal investigation are:

- Failure to report spill or bypass;
- Construction dates without good cause;
- Missing three Discharge Monitoring Reports in a 12 month period;
- Connection ban/production curtailment violation;
- Repeat violations, inadequate correction after escalation;
- Preventable acts causing large violations; and
- Any other violation where penalty may serve as deterrent.

The existing program-specific guidelines allow deviation from all of the above situations. Factors for allowing deviation from the requirements of "mandatory penalties" include

unavailable staff resources and penalties for public entities. With respect to public entities, discretion is to be used to determine if other action would achieve compliance better than penalty and should consider local conditions, resources, and other factors.

New Jersey's Mandatory Penalty Program

Since 1991, the state of New Jersey has implemented a mandatory penalty program for "significant violators" and "serious violations." Significant noncompliance results in a $5,000 mandatory minimum penalty; serious violations result in a $1,000 mandatory minimum penalty. New Jersey's law also requires annual inspections at all permitted facilities. New Jersey has a significant amount of staff dedicated to field inspections and enforcement (50 to 60 staff). Staff verify violations through inspections (all facilities are inspected at least annually; those with significant violations are inspected more frequently) before issuing the penalty. New Jersey does not issue penalties for non-significant/serious violations. Public and private entities are both subject to and issued mandatory penalties. New Jersey's law also requires locally pretreatment delegated communities to employ mandatory penalties and to report to the state. New Jersey reports a significant trend towards reduced violations, overall. New Jersey's law also requires annual reporting of compliance statistics, requiring detail data collection, tracking, and management. Staff believes use of mandatory penalties played a role in reducing significant noncompliance, but that the reduction could have happened without mandatory penalties.

State of California

The state of California is currently instituting a mandatory penalty program. The California Assembly passes a mandatory penalty bill in summer 1999. It is to go into effect January 1, 2000. In February 1999, the California's Legislative Analyst Office (LAO) released its annual budget report. This report included a detailed section regarding the California water board. The water board is the NPDES delegated state agency for California. The report, among other things, strongly endorsed and recommended the establishment of minimum mandatory penalties in California. Specifically, the report concludes:

- "…. That mandating minimum penalties for serious and chronic violations is a cost-effective enforcement approach that induces compliance. We [the LAO] recommend enactment of legislation mandating minimum penalties in specified circumstances…"

- "…. Where law has mandated minimum penalties for water quality violations, substantial increases in compliance have resulted…"

- "We recommend the enactment of legislation to mandate the assessment of penalties for serious and chronic water quality violations. Such legislation could serve to make enforcement actions more consistent by prescribing a protocol for enforcement and would be cost-effective…"

As a result of the LAO report, the 1999 California Legislature contemplated Assembly Bill 50. That bill proposed three main areas:

- Require pollution prevention and total cost accounting and include these as conditions of wastewater permits.

- Mandate that all wastewater permits have at least one effluent limit.

- Require penalties for serious or chronic violations. For the first serious violation, the penalty would be $3,000. For two serious violations within a 180-day period, the penalty would $3,000 per day. For four violations of any limit within a 180-day period, the penalty would be $3,000 per day.

Staff at the California Water Resources Board supported the mandatory penalty component but opposed including pollution prevention requirements as part of the wastewater permit. The California Assembly passed a mandatory penalty bill in 1999 and the California governor signed it into law in early summer 1999. The bill retains a mandatory penalty provision, allows but does not require pollution prevention planning, and requires consideration of economic benefit from the noncompliance in penalty calculation.

Factors in deciding on mandatory penalties

- Current practice is discretionary and intended to customize the compliance action for a given circumstance and violator.
- Current philosophy is that non-penalty enforcement is more effective with public entities.
- Mandatory penalties result in unfair situations:
  - Some permittees will be penalized where limits are wrong
  - Hardship imposed on small entities
- Use of penalties is staff resource-intensive:

Verification of violations

  - Action preparation
  - Appeals
  - Legal support
- The California LAO provides argues that mandatory penalties are a cost-effective enforcement strategy.
- Mandatory penalties make clear consequences of noncompliance.
- Requires clear and unambiguous definitions of “significant violations.”
- Is associated with significant improvement in compliance in New Jersey.
- Use in pretreatment delegated communities would significantly add to state oversight workload of those communities.

Specific Discussion Questions

Should existing Ecology discretion in determining when to issue penalties be reduced, eliminated, retained, or enhanced?

Options Considered

1. **Existing Practice.** Continue with existing practice and guidelines.

2. **No Mandatory Penalties.** Remove the term "mandatory" in existing guidelines to reflect current implementation.

3. **Limited Discretion.** De-emphasize, but retain, discretion in existing guidelines. Require full implementation of existing deviation procedures in guidelines. Specify situations subject to discretion.

4. **No Discretion.** Eliminate existing staff discretion in guidelines for certain situations subject to mandatory penalties. Specify Situations Subject to Mandatory Penalties

5. **Institute New Jersey-like Model.** Build budget proposal to cover costs of inspections, violation verifications, case preparation, appeals, annual reporting, data management, and legal support.

Discussion

Some subcommittee members believe that penalties should be mandatory for significant and chronic violations. Other members of the subcommittee believe that Ecology should retain discretion and make penalty decisions on a case-by-case basis. Other members of the subcommittee expressed concerned that the way effluent limitations are set (i.e., through a statistical confidence level) that violations are anticipated some percentage of the time and that this could place those facilities into a mandatory penalty position.

Subcommittee Recommendations[14]

1. The subcommittee recommends the "**limited discretion, option 3**" and supports the specific criteria listed under tier one and tier two violations for certain serious circumstances, while retaining Ecology discretion on the majority of violations. Specifically, the subcommittee recommends that Ecology establish enforcement policy which would require a "notice of penalty" be issued for the following tier one conditions:

   <u>TIER ONE</u>
   - Failure to report spill or bypass;
   - Violation of an Ecology-imposed connection ban or production curtailment;
   - Repeat violations, within 2-5 years with inadequate correction after escalation to previous penalty;
   - Preventable acts causing large violations, such as an industrial user who causes an upset at a Public Owned Treatment Works (POTW).

[14] WashPIRG dissents from these recommendations believing they are too discretionary.

For tier two conditions, the subcommittee recommends that Ecology should "typically" require a notice of penalty:

TIER TWO

- Serious and critical violations;
- Violations of orders on critical or serious violations;
- Unpermitted dischargers who are required to have a permit;
- Violations of the same nature repeated within two years of a penalty or order;
- Ordered or permitted construction dates without good cause;
- Failure to submit three DMRs in a 12 month period.

These two sets of conditions could be deviated from only through written justification to, and with written approval from, the appropriate Ecology section manager. It is presumed that deviation from mandatory penalty notices, even when in writing would be unlikely for tier one violations.

2. The subcommittee recommends that Ecology review other formal enforcement guidelines for the issuance of administrative orders and notices of violation to determine if changes are appropriate for the criteria to trigger those responses.

Municipal Sewer Connection Bans

Subcommittee Discussion Topic: What is it current use of moratoria to achieve municipal compliance? Can that use be strengthened to enhance moratoria as an effective compliance tool?

Introduction

The Enforcement Subcommittee discussed the following information concerning use of municipal sewer connection bans at its May 13, 1999, meeting. Specifically, the subcommittee reviewed the practice over the past 10 years and discussed a draft policy that would standardize moratoria and establish criteria for its use as a means to achieve municipal compliance for serious capacity-related violations.

Background and Discussion

Over the past 10 years, moratoria have been used relatively rarely:

Office	# of Municipal	# Moratoria	%
CRO	55	4	7.3%
ERO	92	8	8.7%
NWRO	78	5	6.4%
SWRO	94	13	13.8%
TOTAL	**319**	**30**	**9.4%**

Ecology believes moratoria are one of its most effective tools to achieve municipal wastewater compliance. However, moratoria have also been imposed through different means. Some offices emphasize self-imposed moratoria, through encouragement or the threat that an order would be issued. Other moratoria through administrative order. Some moratoria have been imposed as a permit condition. At least one was imposed as a conditional engineering report approval. Signatory authority for the various ways of imposing moratoria reflects the type of method used, i.e., imposed by permit managers through permit conditions or section heads as signatory to administrative orders.

Public notice was not given in a majority of the cases. Additionally Ecology has not centrally tracked moratoria for reporting purposes.

Ecology proposed to the subcommittee new policy and procedures to strengthen its use of moratoria. The subcommittee discussed possible changes to Ecology's proposal.

Ecology would impose a moratorium when:

- There is no self-imposed moratorium in place.
- The municipality has reached or exceeded 100% of treatment capacity.
- Capacity-related effluent limit violations occur.
- The municipality is not planning for increased capacity or improvements to its sewerage system.
- For other cases, where in the judgment of the department a moratorium is the best tool to achieve compliance.

Ecology proposes to try to get a community to self-impose a moratorium and will typically follow the sequence below:

.

- Local imposition through local ordinance. The local ordinance must require Ecology prior approval to amend or repeal the ordinance in order to prevent an Ecology-initiated ordered.
- Ecology Consent Order.
- Ecology Unilateral Order.

Prior notice to the community and public notice would occur. Signature authority would be standardized and moratoria would be centrally tracked for reporting.

Options Considered

1. **Support** Ecology's draft policy changes on moratoria.

2. **Suggest changes** to Ecology's draft policy changes on moratoria.

3. **Be neutral** on Ecology's draft policy changes on moratoria.

4. **Oppose** Ecology's draft policy changes on moratoria.

Subcommittee Recommendations

1. The subcommittee supports Ecology's draft moratorium policy modified as follows:
    - Support the first three criteria for determining when a moratorium is mandatory: (a) no local moratorium is in place; (b) facility has reached 100% capacity; and (c) facility is experiencing repeated effluent limit violations.
    - Eliminate criterion (d) no planning is underway.

Designating Priority Violators

Subcommittee Discussion Topic: Are there certain types of violations that are worse than others? What are the characteristics of certain violators that cause Ecology to need to respond?

Introduction

The Enforcement Subcommittee discussed the following information concerning the characteristics of serious violators at its May 13, May 26 and June 9, 1999, meetings. This section contains the results of those discussions. Specifically, discussion centered on the qualitative descriptors contained in current Ecology enforcement guidelines, EPA's "significant noncompliance" definition, how differentiating violations affect Ecology use of enforcement, and how tracking trends of priority violators could be used as trends in point source compliance.

Enforcement resources need to be applied to significant violations of water quality requirements. At the same time, enforcement resources are limited. Determining significance involves both qualitative and quantitative decisions. Additionally, professional judgement and discretion must be used to ensure that the limited enforcement resources of the agency's are used wisely and effectively.

Background and Discussion

Ecology Water Quality Categories of Violations

Current agency guidelines focus on violations (rather than on violators) and are qualitative only. The following summarizes the various terms and definitions used in the existing compliance guidelines.

- *Significant violations* are defined as being either "critical or serious."
- *Critical violations* are defined as being an "actual or imminent health or environmental threat."
- *Serious violations* are defined as being a "potential health or environmental threat."
- *Repeat or continuing violations* are also used in the guidelines, but are not defined.
- *Large violations* are used, such as a publicly owned treatment works upsets caused by industrial user discharge.
- *Non-significant violations* are defined as "non-aggravated or marginal."
- *General violations* are defined as having:
  - *No significant threat to health or environmental threat;*
  - *Marginal exceedances of effluent violations; or*
  - *Other minor permit violations.*

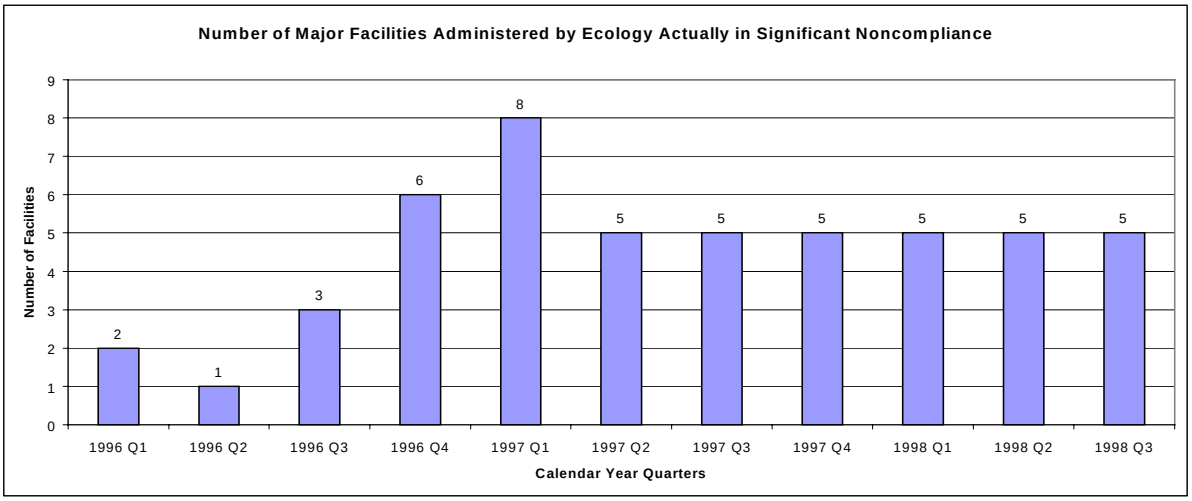
EPA's Definition of "Significant Noncompliance"

The U.S. Environmental Protection Agency (EPA) has a national standard definition of significant noncompliance, which it applies to "major" wastewater permitted facilities. In Washington, there are 85 "major wastewater" facilities. These 85 facilities represent about two percent of the total, 4,300-wastewater discharge permitted facilities.

EPA determines significant noncompliance through using a computer program, Permit Compliance System. The computer program designates a major facility to be in significant noncompliance (SNC) if:

- 40 percent exceedance of certain "conventional pollutants" or 20 percent exceedance for certain "toxic pollutants" two or more months during two consecutive quarters;
- Any exceedance of certain pollutants for any four or more months during two consecutive quarters;
- Any exceedance of pollutants that causes or has the potential to cause a water quality or human health problem;
- Unauthorized or unpermitted discharge that causes has the potential to cause a water quality or human health problem;
- Permit schedule violations;
- Self monitoring reports non-submittals or later than 30 days; and
- Violations of enforcement orders.

The table below summarizes the number of major wastewater discharge facilities which have been designated SNC over the past two years, by quarter. As the chart shows, only a portion of the total possible number of major dischargers is in SNC during any one particular quarter.



There are problems with determining significant noncompliance in Washington. First, discharge monitoring reports (DMRs) from major wastewater facilities are mailed to EPA Region 10 from Ecology. In some cases, they are mailed from the facility to both Ecology and EPA. At EPA, they must be entered into EPA's Permit Compliance System. Recently, there has been a backlog of data entry due to staff turnover. That data entry backlog can result in facilities being designated SNC (due to failure to report) when in fact they are not. Ecology must review the EPA's draft SNC list to determine which facilities are legitimately in SNC. Finally, it also needs to be recognized that only 2% of all Washington wastewater permit facilities are subject to EPA's SNC designation. Ecology must balance that designation with violations from the remaining 98% of wastewater permitted facilities in deciding where to spend its limited enforcement resources.

On the positive side, SNC is a standard national definition used under the federal Clean Water Act. Other EPA regions and states all use SNC in the National Pollutant Discharge Elimination System. It is unlikely this will change in the near future. Finally, SNC contains several criteria that are quantitative, and hence objective, as compared with existing Ecology qualitative descriptors.

Discussion Options – Characteristics of "Serious Violators"
Several options follow that consist of attributes that could be used to categorize violators. While presented as options, the following really should be viewed as lists of characteristics or attributes that could be mixed to form a description of what would be a "serious violator." If selected, these descriptions could be used to establish a baseline of serious violators to be tracked over time. This trend analysis could be included in periodic public reporting as a means to achieve state and discharger accountability for compliance.

To be used effectively, it is imperative that whatever attributes, if any, are recommended that they can be automated using existing data management systems in order to achieve no net increase in administration of the enforcement program.

Expand SNC to NPDES minors and state waste discharge permittees.
This option uses the existing EPA significant noncompliance criteria.

Under this option, serious violators means dischargers that exhibit the following characteristics:

1. A 20% exceedance of the toxic effluent limit listed in the permit at a given discharge point two or more months during the two consecutive quarter review period;
2. A 40% exceedance of the conventional effluent limit listed in the permit at a given discharge point two or more months during the two consecutive quarter review period; or
3. Violation of an effluent limit four or more months at a given discharge point during the two consecutive quarter review period;

4. Unauthorized bypass, unpermitted discharge, or pass through of pollutants which causes or has the potential to cause a water quality problem;
5. Permit schedule violations;
6. Permit reporting violations; and
7. Enforcement order violations.

“Conventional pollutant" means a pollutant listed as a conventional pollutant under 33 U.S.C. Sec. 1314(a)(4) as it existed on the effective date of this section;

“Toxic pollutant" means a pollutant listed as a toxic pollutant pursuant to 33 U.S.C. Sec. 1317(a) as it existed on the effective date of this section.

Combination of SNC and mandatory or typical notice of penalty criteria option.
This option would consist of SNC criteria and the criteria contemplated by Ecology to be used to determine when issuance of a notice of penalty is either mandatory or would occur “typically.” This option also includes some qualitative factors in determining whether nonpoint source violators were serious. Some of these criteria were taken from EPA’s penalty settlement policy. (See “Mandatory Penalties” Section)

Under this option, serious violators would mean dischargers that exhibit the following characteristics:

For point source violators:

1. A 20% exceedance of the toxic effluent limit listed in the permit at a given discharge point two or more months during the two consecutive quarter review period;
2. A 40% exceedance of the conventional effluent limit listed in the permit at a given discharge point two or more months during the two consecutive quarter review period; or
3. Violation of an effluent limit four or more months at a given discharge point during the two consecutive quarter review period;
4. Unauthorized bypass, unpermitted discharge, or pass through of pollutants;
5. Permit schedule violations;
6. Failure to report spill or bypass;
7. Violation of an Ecology-imposed connection ban or production curtailment;
8. Repeat violations with inadequate correction after escalation to previous penalty;
9. Preventable acts causing large violations such as an industrial user who causes an upset at a POTW;
10. Violations of the same nature repeated within two years of a penalty or order;
11. Missing construction dates without good cause;
12. Failure to submit three DMRs in a 12 month period;
13. Enforcement order violations; and
14. Failure to submit required reports within 30 days of due date without good cause.

“Conventional pollutant" means a pollutant listed as a conventional pollutant under 33 U.S.C. Sec. 1314(a)(4) as it existed on the effective date of this section.

“Toxic pollutant" means a pollutant listed as a toxic pollutant pursuant to 33 U.S.C. Sec. 1317(a) as it existed on the effective date of this section.

For nonpoint source violators:

- Fecal Coliform effluent discharges that cause a localized water quality effect of >500% of the standard.
- pH violations of >3 standard units above or below pH standard.
- Discharges that cause increased risk to subsistence fishing.
- Discharges that cause fish kills, beach closing, or other restrictions on use of a water body.
- Verified discharge from a dairy.
- Unauthorized discharge.

New Jersey’s Definition.

This option would define serious violators using New Jersey’s clean water enforcement act. Under that law, serious violators means dischargers that exhibit the following characteristics:

> “Serious violation” means exceedance of an effluent limitation for a discharge point source set forth in a permit, administrative order, or administrative consent agreement, including interim enforcement limits, by 20 percent or more for a hazardous pollutant, or by 40 percent or more for a nonhazardous pollutant, calculated on the basis of the monthly average for a pollutant for which the effluent limitation is expressed as a monthly average, or, in the case of an effluent limitation expressed as a daily maximum and without a monthly average, on the basis of the monthly average of all maximum daily test results for that pollutant in any month; in the case of an effluent limitation for a pollutant that is not measured by mass or concentration, the department shall prescribe an equivalent exceedance factor therefor. The department may utilize, on a case-by-case basis, a more stringent factor of exceedance to determine a serious violation if the department states the specific reasons therefor, which may include the potential for harm to human health or the environment. “Serious violation” shall not include a violation of a permit limitation for color.
>
> “Significant noncomplier” means any person who commits a serious violation for the same hazardous pollutant or the same nonhazardous pollutant, at the same discharge point source, in any two months of any six month period, or who

> exceeds the monthly average or, in a case of a pollutant for which no monthly average has been established, the monthly average of the daily maximums for an effluent limitation for the same pollutant at the same discharge point source by any amount in any four months of any six month period, or who [for a person required to submit monthly DMRs,] fails to submit a completed discharge monitoring report in any two months of any six month period. The department may utilize, on a case-by-case basis, a more stringent frequency or factor of exceedance to determine a significant noncomplier, if the department states the specific reasons therefor, which may include the potential for harm to human health or the environment. A local agency shall not be deemed a "significant noncomplier" due to an exceedance of an effluent limitation established in a permit for flow.

"Hazardous pollutant" includes:

- Toxic pollutants identified in the CWA (with description of adverse effects);
- Any FIFRA-regulated substance;
- Any TSCA-regulated substance;
- Any substance identified as a known carcinogen by the International Agency for Research on Cancer;
- Any designated substance under RCRA; and
- Other substances designated hazardous waste under WA hazardous waste law.

California's proposed definition.

This option would define serious violator using the definitions contained in proposed California legislation (Assembly Bill 50). Under that bill, serious violators means dischargers that exhibit the following characteristics:

> A "serious violation" means any waste discharge that exceeds the effluent limitations for a hazardous pollutant by 20 percent or more or for a pollutant other than a hazardous pollutant by 40 percent or more.
>
> A single operational upset that leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.
>
> A "serious violator" means any person who commits either of the following:

- Two or more serious violations in any 180-day period;
- The person does any of the following four or more times in any 180-day:
  - Exceeds a waste discharge required effluent limitation;
  - Fails to file a report; and
  - Files an incomplete report.

EPA Penalty settlement "significance of violation" criteria.
This option would borrow criteria from EPA's existing penalty settlement policy that address "significance of the violation." (See "Mandatory Penalties" Section). Generally, only criteria that were at the upper end of the ranges of point values (i.e., the greater the impact concern, the higher the point value) were used here. This is a mix of quantifiable and qualifying criteria.

Using these criteria, serious violators would mean dischargers that exhibit the following characteristics:

- Toxic effluent limitations exceedances of:
  - >100% monthly average,
  - >150% 7-day average, and
  - >200% daily maximum.
- Conventional and nonconventional effluent limitations exceedances of:
  - >300% monthly average,
  - >450% 7-day average, and
  - >600% daily maximum.
- Fecal Coliform effluent limitations exceedance of >500%;
- pH violations of >3 standard units above or below pH limit;
- Interference with drinking water supplies;
- Increased risk to subsistence fishing;
- WQ-based effluent limit violations or WET limit violations;
- Fish kills, beach closing, restrictions on use of a water body;
- Pass through or interference at the POTW caused by an IU discharge;
- 100% of effluent limits in violation in a given time period;
- Failure to conduct or submit sampling data for multiple parameters;
- Failure to conduct or submit WET sampling data;
- Few if any pretreatment program activities implemented; and
- Unauthorized discharge.

Subcommittee Recommendations

1. The subcommittee recommends Ecology establish a state-specific definition to differentiate between violators having occasional, marginal or inconsequential permit violations and other violations which warrant a greater degree of Ecology scrutiny due to scale, magnitude, frequency, or potential of human or environmental harm. The department should designate the latter as "**priority violators**."

2. The definition of **"priority violators"** should be quantifiable and objective. Examples of criteria[15] the department should consider in designating **"priority violators"** are:

    - A 20% exceedance of the monthly average of the toxic effluent limit listed in the permit at a given discharge point two or more months during the two consecutive quarter review period;
    - A 40% exceedance of the monthly average of the conventional effluent limit listed in the permit at a given discharge point two or more months during the two consecutive quarter review period; or
    - Violation of an effluent limit four or more months at a given discharge point during the two consecutive quarter review period;
    - Unauthorized bypass, unpermitted discharge, or pass through of pollutants;
    - Permit schedule violations;
    - Failure to report spill or bypass;
    - Violation of an Ecology-imposed connection ban or production curtailment;
    - Repeat violations with inadequate correction after escalation to previous penalty;
    - Preventable acts causing large violations such as an industrial user who causes an upset at a POTW;
    - Violations of the same nature repeated within two years of a penalty or order;
    - Missing construction dates without good cause;
    - Failure to submit three DMRs in a 12 month period;
    - For sanitary sewer systems, 100% design capacity exceeded and repeat effluent limit violations; and
    - Enforcement order violations.

3. Ecology should track and publish a graph of priority violators designating under the above definition for the purposes of tracking compliance over time.[16]

4. Some members of the subcommittee are concerned that the objective criteria above may result in a discharger meeting the designation of a priority violator, but in actuality be contributing only a very small mass as a consequence. Other members of the subcommittee believe that any potential unfairnesses are contemplated by the Clean Water Act to achieve the broad remedial purposes of the Act. These factors should be considered by Ecology in determining the appropriate enforcement response.

[15] These criteria are the criteria that are a combination of (1) EPA's SNC; (2) the Subcommittee's recommended mandatory penalties criteria; and (3) the subcommittee's recommended municipal sewer connection ban criteria.
[16] See recommendations under "Public Reporting of the Compliance Program."

Public Reporting of the Compliance Program

Subcommittee Discussion Topic: What types of information are useful to the public and groups interested in point source compliance? How can the compliance program be communicated? What should be the frequency of those reports?

Introduction

The Enforcement Subcommittee discussed the following information concerning how the compliance program could be reported publicly at its May 26 and June 9, 1999, meetings. This section contains the results of those discussions. Specifically, discussion centered on what should be reported and how frequently.

Background

Virtually all information on Ecology's permit program is to be publicly disclosed upon request under state law. Washington's public disclosure statute, enacted through citizens' initiative, is very clear that only rare kinds of information are not required to be disclosed – these mainly relate to specific ongoing formal enforcement actions that are in process and certain financial information that are proprietary of businesses.

State agencies have legal obligations to respond (generally within five working days) to a public request or to explain when the request would be responded to. Additionally, agencies are to make records available if persons want to go through files on their own.

Prior to 1994, most requests for public record on Ecology's permit program were in person or hardcopy. Shortly after that time, Ecology's central database was able to provide reports. However, most were "customized" database queries due to database limitations.

After a series of similar requests for permit compliance data and a growing cost of developing those customized reports, in 1996, Ecology began to publish periodic reports showing reported effluent limit violations and Ecology compliance actions. The reports were at the interpretation of the reader, with little or no context or analysis provided. Consequently, readers drew their own interpretations and in some cases published those interpretations. Some of those interpretations resulted in perceptions that Ecology's compliance program was not effectively responding to all violations.

This issue is how Ecology should communicate its compliance program so that interested citizens or groups get the information they need while understanding the context and or significance of the compliance status of Washington's permitted dischargers.

At the May 26, 1999, meeting of the subcommittee, Ecology staff presented an outline of how such a report could be formatted. The outline was presented to prompt discussion for future cost estimates and referral to Ecology management. That outline is

Attachment 1 to this section. Attachment 2 to this section is a list of current enforcement reporting obligations Ecology has to EPA.

Subcommittee Discussion

What types of information would be useful in a periodic report on the compliance program?

The subcommittee identified several items that could be included in a report on the compliance program:

- Compliance rates
- Balance, not just the "big, bad guys"
- Successes
- Trends
- Measures of success
- What was done to address violations
- Spread the credit for compliance
- Who violated and who was punished
- Number and percent violations (gross and individual)
- Explanation and context
- Names for significant violators
- Agency responses
- Information on impacts
- Comparison over time
- Type of violation by parameter
- Industrial categories compliance rates (facilities and percent)
- Define and explain the information
- Frequency: 18-24 months or annual

Subcommittee Recommendations

1. The subcommittee recommends Ecology periodically publish a report on status of compliance with the wastewater discharge permit program requirements. The frequency of the report should be annual.

2. In the report, the subcommittee recommends Ecology track trends over time for the following:

    - Compliance rates (or "non-compliance rates") expressed as the number and percent of facilities having violations compared to the total number of facilities within various industrial and municipal categories of permit holders.
    - Compliance rates (or "non-compliance rates") expressed as the number and percent of violations compared to the total number of possible violations in various industrial and municipal categories of permit holders (e.g., effluent limit violations.)

- The name, number and percent of “priority violators” and respective compliance rates.
- Compliance successes.
- Basic statistics of enforcement actions (i.e., number).
- Acknowledgement and inclusion as available of other forms of compliance actions.
- Availability of compliance resources.

3. The subcommittee recommends EPA and Ecology work to streamline and integrate EPA compliance reporting requirements within the subcommittee’s recommended annual compliance.

ATTACHMENT 1 to PUBLIC REPORTING OF THE COMPLIANCE PROGRAM

An Example of Table of Contents for the WQ Enforcement Annual Report

I. Executive Summary: Goals and Factors Affecting Trends and Enforcement Projections.
(The executive summary would offer a statement about our goals and/or enforcement philosophy—to review and respond to all violations and any conclusions an analysis of the data may render, i.e., violations are up/down as compared to last year, what violations occurred by industry category or region or type. It would provide background information and correlations, if any, to the number of new permits issued, actions taken, both formal and informal estimates and answer the question, "How Good of a Job Are We Doing Overall?")

II. The Water Quality Regulated World in Washington
- **Nonpoint & Unpermitted Dischargers/State Waste & NPDES Discharge Permits**
- **Compliance Rates** *(Explain effluent limits and the percent of compliance expected. Also explain why that doesn't tell the whole compliance story.)*
- **The Enforcement Process** *(Primary tools for doing the job, formal and informal.)*

III. Current Activities Affecting Enforcement *(This section should be relatively brief.)*
- **Watershed Industry Sweeps** *(Including dairy inspection sweeps)*
- **Water Clean-up Plans** (*A paragraph on the purpose, scope, and timetable for implementing Water Clean Up plans would be included as well as a list of the plans done this fiscal year. We may discuss the timetable for future plan development and new FTEs requested and refer the reader to more comprehensive data sources as appropriate.)*
- **Regulatory Changes** *(New permits, changes in WQ standards, groundwater limits, etc.)*
- Grants/Loans ***(How they affect enforcement, the interagency coordinating committee)***
- **El Nino & La Nina?** *(How weather patterns affect compliance)*
- **Enforcement Resources vs. Duties: Ecology FTEs assigned by category**

IV. Dairy Enforcement *(This includes the number of formal actions taken, broken out by action type.)*
- **What Violations Occurred** *(Violations by Ecology region, county, or other geographic area)*
- **What Actions Were Taken** *(Inspections, NOVs, NOCs, Orders, Penalties*
- **What Actions Were Most Effective: Compliance Narratives** *(This includes a number of short stories showing a range of action types and outcomes.)*
- **How Good of a Job Are We Doing?** *(Criteria have yet to be established and agreed on to answer this question. We may want to suggest adding the median action response time if it's available in the new database. We could discuss the number of cases appealed or lost. If the information is available, we could include what the press, elected officials, the public, and special interest groups say about our policies. We could discuss the penalty parity issue between dairies and municipalities and whether these inquires are causing us to be introspective or stand firm on our decisions. We could consider graphing the COMPLIANCE RATE OF FACILITIES by quantity and percent)*
- **Where Do We Need To Improve?** *(This includes our strategy for identifying areas to improve, work on any problem areas that were identified, work with WQ*

Partnership groups and others. For example, nonpoint water quality pollution is alleged (by EPA) to be approximately 85 percent of the problem. At Ecology less than one third of the resources are devoted to nonpoint while two thirds of the resources is devoted to point source pollution.)

V. Industrial Facility Enforcement

- **What Violations Occurred** *Violations by Ecology region, county or other geographic area)*
- **What Actions Were Taken** *(Inspections, NOVs, NOCs, Orders, Penalties.)*
- **What Actions Were Most Effective: Compliance Narratives** *(This includes a number of short stories showing a range of action types and outcomes.)*
- **How Good of a Job Are We Doing?** *(Criteria have yet to be established and agreed on to answer this question. We may want to suggest adding the median action response time if it's available in the new database. We could discuss the number of cases appealed or lost. If the information is available, we could include what the press, elected officials, the public, and special interest groups say about our policies. We could discuss the penalty parity issue between industries and municipalities and whether these inquires are causing us to be introspective or stand firm on our decisions. We could consider graphing the COMPLIANCE RATE OF FACILITIES by quantity and percent, including the average number of violations by facility. We could break these out by permit type and SIC code.)*
- **Where Do We Need To Improve?** *(This includes our strategy for identifying areas to improve, work on any problem areas that were identified, work with WQ Partnership groups and others.*

VI. Municipal Facility Enforcement

- **What Violations Occurred** *Violations by Ecology region, county, or other geographic area)*
- **What Actions Were Taken** *(Inspections, NOVs, NOCs, Orders, Penalties.)*
- **What Actions Were Most Effective: Compliance Narratives** *(This includes a number of short stories showing a range of action types and outcomes.)*
- **How Good of a Job Are We Doing?** *(Criteria have yet to be established and agreed on to answer this question. We may want to suggest adding the median action response time if it's available in the new database. We could discuss the number of cases appealed or lost. If the information is available, we could include what the press, elected officials, the public, and special interest groups say about our policies. We could discuss the penalty parity issue between industries and municipalities and whether these inquires are causing us to be introspective or stand firm on our decisions. We could consider graphing the COMPLIANCE RATE OF FACILITIES by quantity and percent, including the average number of violations by facility.*
- **Where Do We Need To Improve?** *(This includes our strategy for identifying areas to improve, work on any problem areas that were identified, work with WQ Partnership groups and others.)*

VII. Storm Water Enforcement Related to Construction Sites, Industrial Facilities and Municipalities

- **What Violations Occurred** *Violations by Ecology region, county, or other geographic area)*
- **What Actions Were Taken** *(Inspections, NOVs, NOCs, Orders, Penalties*
- **What Actions Were Most Effective: Compliance Narratives** *(This includes a number of short stories showing a range of action types and outcomes.)*
- **How Good of a Job Are We Doing?** *(Criteria have yet to be established and agreed on to answer this question. We may want to suggest adding the median action response time if it's*

available in the new database. We could discuss the number of cases appealed or lost. If the information is available, we could include what the press, elected officials, the public, and special interest groups say about our policies.

- **Where Do We Need To Improve?** *(This includes our strategy for identifying areas to improve, work on any problem areas that were identified, work with WQ Partnership groups and others.)*

VIII. Timber Fish and Wildlife Enforcement

- **What Violations Occurred** *Violations by Ecology region, county, or other geographic area)*
- **What Actions Were Taken** *(Inspections, NOVs, NOCs, Orders, Penalties. Watershed Analysis & Legal issues would be covered and a note included explaining guidance under RCW 76.09.100.)*
- **What Actions Were Most Effective: Compliance Narratives** *(This includes a number of short stories showing a range of action types and outcomes.)*
- **How Good of a Job Are We Doing?** *(Criteria have yet to be established and agreed on to answer this question. We may want to suggest adding the median action response time if it's available in the new database. We could discuss the number of cases appealed or lost. If the information is available, we could include what the press, elected officials, the public, and special interest groups say about our policies.*
- **Where Do We Need To Improve?** *(This includes our strategy for identifying areas to improve, work on any problem areas that were identified, work with WQ Partnership groups and others. One area of critical concern is erosion and sediment control associated with construction sites)*

IX. Who and Where Are the Worst Violators *(We do not have consensus that this area should be included; however, we could list penalties issued with the highest penalties. We usually treat our "worst" dischargers with the highest penalties so this may suffice.)*

X. Criminal Actions *(To be covered by our criminal enforcement staff)*

Appendix A: List of All Active Formal Actions by Ecology *(Includes Orders and Penalties plus any NOVs or NOC issued during the year.)*

Appendix B: GIS Maps

Counties/Major cities/Permitted Facilities

Regional Boundaries

Regional Offices & Contacts

ATTACHMENT 2 to PUBLIC REPORTING OF THE COMPLIANCE PROGRAM

Washington/EPA Region 10 Performance Partnership Agreement, Enforcement Reporting Obligations

Ecology currently has the following reporting obligations to US EPA regarding its enforcement program:

1. Rates of Significant Non-compliance for selected regulated populations. (Calculated by EPA based on the information provided by Ecology as described below.)
2. Number of inspections planned (with mid- and end-of-year targets) and conducted (major and targeted minor permitted facilities) on a state fiscal year basis.
3. "Results" of inspections of majors reported quarterly.
4. Number of pretreatment compliance inspections (PCIs) and audits conducted at POTWs with approved pretreatment programs
5. Reports on NPDES minors containing the necessary inspection information for minor facilities quarterly.
6. At least annually, report showing enforcement actions taken against all NPDES permitted facilities and all non-permitted facilities in the State of Washington. The report will provide the violator name, nature of violations, date and type of enforcement action, and amount of penalty assessed.
7. Copies of enforcement actions to major facilities to EPA.
8. Report on enforcement actions for minor facilities to EPA quarterly
9. Quarterly SNC and Exceptions Lists with showing compliance action taken or providing an explanation and acceptable justification why no action was taken. Ecology's explanation for no enforcement action will include the reason for the violation(s) appearing in the QNCR; corrective action taken by facility; and projected date of return to compliance.
10. Pretreatment audit addresses reporting requirements and compliance.
11. CSOs: Ecology will provide the following information to EPA regarding CSO facilities: 1) names or permit number of CSO dischargers that have implemented the controls per the permit rules and that have implemented or are on a schedule to implement a long term control plan as well as the mechanism used (e.g., permit requirements, enforcement action, and 2) a plan for addressing CSO dischargers not in compliance with the CSO rule.
12. EPA Enforcement Actions on Tribal lands and for Federal Facilities. At least annually, EPA will provide Ecology with a report showing enforcement actions taken on Tribal lands and against other federally owned and operated facilities within the State of Washington. The report will provide the violator name, nature of violation, date and type of enforcement action, and amount of penalty assessed.
13. EPA Enforcement Actions in other region 10 states. EPA will forward to Ecology copies of EPA enforcement actions taken in Oregon, Idaho, and Alaska after respondents have been officially served.

Available Staff Resources of the Water Quality Enforcement Program

Subcommittee Discussion Topic: What are current levels of Ecology enforcement staff resources? Is there currently an unmet need? What are the projected costs associated with implementing the subcommittee's recommendations?

Introduction

The Enforcement Subcommittee discussed the following information concerning the level of resources in the water quality compliance program at its June 9, 1999, meeting. This section contains the results of those discussions. Specifically, discussion centered on how many staff resources are currently dedicated to the enforcement program and what the added costs of each of the subcommittee recommendations could be.

Current Enforcement Resources

Currently, Ecology has about 7-7.5 FTEs devoted to formal enforcement actions. This includes 6 FTEs and a portion of supervision in the Water Quality Program, and portions of an FTE in the Industrial Section, Nuclear Waste Program and Attorney General's Office.

This total enforcement component represents a small portion of the overall permit program. The agency total permit program has about 133 non-enforcement FTEs[17]. The enforcement function is about 5% of the combined enforcement and permit program total (140 FTEs).

Total point source resources in relationship to enforcement resources and permittees are:

- **Agency Total Permit Program Staff (FTEs[18]):** Approximately 133 FTEs (non-enforcement)
- **Agency Total Permit Program Enforcement Staff (FTEs):** Approximately 7.5 FTEs (formal enforcement)
- **Agency Total Permit Universe:** Approximately 4,300 permittees

The level of enforcement staff has remained essentially constant since 1991 when the department had a permit universe of about 1100 permittees. Currently, there are over 4300 permittees. This represents an increase of enforcement staff to permittees from 1:150 to the present 1:600.

[17] Ecology has made a policy determination to not use permit fees for formal enforcement actions. Informal compliance actions, however, can be fee-funded.
[18] FTE: Full time equivalent. 1.0 FTE is one staff person full time for one full year.

Additionally, there is no current dedication of staff resources from a central office coordination function. As a consequence, regional enforcement staff are given extra duties for policy and information sharing. Some of these additional duties are essential for a credible managed program. However, not having a central office position dedicated to the enforcement program means field enforcement staff shouldering a large amount of work which is more administrative in nature.

Current Unmet Need

It is estimated that four additional enforcement FTEs are needed to fill current unmet needs. This level of funding would reduce the current enforcement staff to permittee ratio from 1:600 to about 1:400, still high compared with historic rates. However, with improved information and compliance tracking systems, this level of resources is expected to provide sufficient enforcement oversight in the state.

Estimated Costs of Subcommittee Recommendations

Municipal Sewer Hookup Moratorium

Negligible. Minor costs associated with populating design capacity fields initially. Comparable current costs of issuing other administrative orders.

Public Reporting

0.25 FTE combined, including data gathering and analysis, production, and disclosure. This cost could be captured in the 1 FTE central office coordination described under Current Unmet Need.

Mandatory Penalties

0.5 FTE combined. This cost could be captured in the 3 FTE described under Current Unmet Need.

Designating Priority Violator

0.1 FTE, including data gathering and analysis, trends tracking and reporting. This cost could be captured in the 1 FTE central office coordination described under Current Unmet Need.

Penalty Matrix Revisions

0.15 FTE, including data gathering and analysis, trends tracking and reporting. This cost could be captured in the 1 FTE central office coordination described under Current Unmet Need.

Timeliness of Response

No additional impact.

Municipal and Industrial Treatment

No additional impact.

Subcommittee Recommendations

1. The subcommittee recommends Ecology implement the subcommittee enforcement program recommendations. These have a combined estimated cost of about 1 FTE in order to conduct the necessary actions and establish the required procedures.

2. The subcommittee recommends that Ecology establish and fill a central office water quality enforcement coordination function.

3. The subcommittee acknowledges a current unfunded need in the enforcement program!